132 146

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1140.

PATRICK C. BOYLAN, PLAINTIFF IN ERROR,

vs.

THE HOT SPRINGS RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED APRIL 29, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1140.

PATRICK C. BOYLAN, PLAINTIFF IN ERROR,

vs.

THE HOT SPRINGS RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Præcipe for summons	2	1
Bond for costs	3	2
Summons	4	2
Marshal's return	5	3
Declaration	6	3
Demurrer	25	11
Order taking demurrer under advisement	28	12
Order overruling demurrer, &c.	28	12
Stipulation extending time to plead	29	13
Pleas	30	14
Joinder, demurrer, and motion as to pleas	43	19
Order sustaining demurrer to certain pleas, &c.	45	20
Amended and additional pleas	46	21
Demurrer to certain amended pleas	50	23
Order sustaining demurrer to amended pleas	51	23
Judgment	52	23
Bill of exceptions	53	24
Testimony of Patrick C. Boylan	53	24
Copy of ticket and coupon	64	31
Deposition of Wm. H. Wood	68	33
Testimony of Patrick C. Boylan (recalled)	74	37
Motion to strike out certain evidence	74	37
Verdict	76	38
Motion for new trial	76	39

JUDD & DETWEILER, PRINTERS, WASHINGTON, JUNE 13, 1889.

	Original.	Print.
Stipulation to submit under 20th rule	80	40
Bond	81	40
Clerk's certificate	83	41
Writ of error	84	41
Citation	85	42
Assignment of errors	86	43
Specification of the full substance of the evidence rejected and excluded	90	45
Joinder in error	93	46

1 Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, judge of the circuit court of the United States for the seventh judicial district, on Monday, the seventeenth day of December, in the December term of said court, in the year of our Lord one thousand eight hundred and eighty-eight, and of our Independence the one hundred and thirteenth year.

WM. H. BRADLEY, *Clerk.*

PATRICK C. BOYLAN
vs.
THE HOT SPRINGS RAILROAD COMPANY. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the ninth day of April, 1887, came the plaintiff, by his attorney, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his præcipe for a summons, and also at the same time his bond for costs in said above-entitled cause; which said præcipe and bond are in the words and figures following, to wit:

2 *Præcipe.*

UNITED STATES OF AMERICA, *Northern District of Illinois:*

In the Circuit Court for the Northern Division of said District.

PATRICK C. BOYLAN
vs.
THE HOT SPRINGS RAILROAD COMPANY. } Assumpsit, $40,000.

The clerk of said court will please issue a summons in the above-entitled cause in a plea of trespass on the case on promises, to the damage of said plaintiff in the sum of forty thousand dollars, directed to the marshal of said district to execute, and make it returnable to the May term of said court, A. D. 1887.

Chicago, April 9th, 1887.

LYMAN M. PAINE,
Plaintiff's Attorney.

To Wm. H. Bradley, Esq., clerk.

(Endorsed:) Filed Ap'l 9, 1887. Wm. H. Bradley, clerk.

3 *Bond for Costs.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } *ss*:

Circuit Court. May Term, A. D. 1887.

PATRICK C. BOYLAN
vs.
THE HOT SPRINGS RAILROAD COMPANY. } In Assumpsit.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him I hereby agree and stipulate that executiou may issue against my property for any costs taxed against said plaintiff.

Dated this ninth day of April, A. D. 1887.

LYMAN M. PAINE.

(Endorsed:) Filed April 9, A. D. 1887. Wm. H. Bradley, clerk.

4 On the same day, to wit, on the ninth day of April, 1887, there issued out of said clerk's office a writ of summons in said entitled cause; which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Summons.

Circuit Court of the United States of America, Northern District of Illinois, *ss.*

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon The Hot Springs Railroad Company, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of May next, to answer unto Patrick C. Boylan of a plea of trespass on the case upon promises, to hisdamage, as is alleged, of forty thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at
[SEAL.] Chicago aforesaid, this 9th day of April, in the year of our Lord one thousand eight hundred and eighty-seven and of
5 our Independence the 111th year.

WM. H. BRADLEY, *Clerk.*

Marshal's Return.

I have served this writ upon The Hot Springs Railroad Company, therein named, by reading the same to and within the presence and hearing of and by delivering a true copy thereof to Joseph Reynolds, president of the aforesaid company, on the 30th day of April, A. D. 1887.

F. H. MARSH,
U. S. Marshal.
GEO. N. JONES, *Deputy.*

(Endorsed:) Filed April 30, A. D. 1887. Wm. H. Bradley, clerk.

6 Afterwards, to wit, on the twelfth day of May, 1887, came the plaintiff, by his attorney, and filed in said clerk's office his declaration in said entitled cause: which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States, at Chicago, of the May Term, A. D. 1887.

PATRICK C. BOYLAN
vs.
THE HOT SPRINGS RAILROAD COMPANY. } Assumpsit.

Patrick C. Boylan, the plaintiff in this case, who is a citizen and resident of the city of Chicago, in the northern district of the State of Illinois, by Lyman M. Paine, his attorney, complains of The Hot Springs Railroad Company, the defendant in this case, which is a corporation, citizen, and resident of the State of Arkansas, duly created and organized therein, and doing business in said State of Illinois by the sale of tickets and the making of contracts for the transportation of persons and property over its line of railroad, which is located in said State of Arkansas, of a plea of tres-
7 pass on the case upon promises, in manner and form as is hereinafter set forth.

First Count.

For that whereas heretofore, to wit, on or about the eighteenth day of March, A. D. 1882, at Chicago aforesaid, the said defendant was then and there engaged in the business of selling tickets and making contracts for the carriage and transportation of persons and property over the line of its said railroad in the State of Arkansas, and a certain other corporation, known and called as and by the

name of the Wabash, St. Louis and Pacific Railway Company, and certain persons acting and doing business under said name, were then and there selling such tickets and making such contracts as the agents of said defendant; and the said plaintiff then and there desired to go and journey from said city of Chicago to the place known as and called by the name of Hot Springs, in said State of Arkansas, and after a short stay there to return to said Chicago; and thereupon said plaintiff then and there applied to said defendant, by and through its said agents, at the office of such agency in said Chicago, and requested the sale to him of a ticket and the making with him of a contract for the safe carriage and transportation of the person of the said plaintiff, and of such property and effects as are commonly known and carried as baggage, from said Chicago to said Hot Springs, and after a reasonable time, not
8 exceeding fifty-five days next thereafter, for the like safe carriage and transportation of the same person and property of said plaintiff from said Hot Springs back to said Chicago.

And thereupon said plaintiff then and there paid to said defendant—that is to say, to said agent—a large sum of money, to wit, the sum of forty-one dollars and fifty cents ($41.50), which sum said agent then and there accepted and received; and thereupon and in consideration thereof said defendant, by said agent, then and there issued and delivered to said plaintiff a certain ticket, contract, and agreement for the carriage journey and return aforesaid, wherein and whereby it was, among other things, recited, provided, and agreed, in substance, as follows, to wit:

1. That the same was issued by said Wabash, St. Louis and Pacific railway.

2. That it was so issued as a special tourist ticket.

3. That it entitled the plaintiff to a first-class passage over the railroads named to Hot Springs, in the State of Arkansas, and to the like passage to return to said Chicago.

4. Subject to the condition that it be officially stamped on the back thereof and presented, with the annexed coupons still attached thereto, to the conductor of the railroad train in which the passage should be taken.

9 5. That in consideration of the reduced rate at which the ticket was sold the purchaser made and signed an agreement thereon with the several companies over whose lines the ticket entitled him to be carried, which agreement contained, in substance, the following provisions, to wit:

1. That the said Wabash, St. Louis and Pacific railway limited its own responsibility for the carriage for which the ticket was issued to its own line of railroad, and acted only as the agent of the other lines of railroad over which the transportation was then to be made.

2. That the ticket should not be transferable, and that the purchaser should not be entitled to any stop-over ticket or privilege unless the same should be allowed by the local regulations of the line on which the passenger should desire to make a temporary stop in the course of his journey.

3. That any alteration of the ticket should render the same void.

4. That the ticket should be good for the going passage from Chicago to Hot Springs for five days only after the date of the sale thereof, as stamped on the back of the same.

5. That the ticket should not be good for the return passage unless the holder thereof should identify himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs railroad, at Hot Springs, in the State of Arkansas, within fifty-five days from the date of the sale thereof, and that it should be good therefor only when officially dated and signed in ink and duly stamped by said agent; and that thereupon the same should be good for the return passage only for five days from the date last aforesaid.

6. That the purchaser agreed to sign his name and otherwise identify himself as such whenever called upon to do so by any conductor or agent of the lines over which the carriage was to be made according to the reading of said ticket.

7. That the liability for a loss or injury to baggage during such transportation should be limited to wearing apparel of a value not exceeding one hundred dollars.

8. That the coupon tickets attached to the principal ticket would not be received and treated as valid if detached therefrom.

9. That the signature of the purchaser to the contract should be in ink.

10. That unless all the conditions of the ticket should be fully complied with it should be void, meaning that it should be voidable at the proper election of the carrier, duly made and communicated to the holder of the ticket.

11. That the purchaser should not hold any of the lines of railroad, meaning the owners and proprietors of said lines, liable for or on account of any statement not in accordance with the contract made by any person employed on any of said lines.

12. And finally that no agent or employee of any of said lines had any power to alter, modify, or waive in any manner any of the conditions named in the contract.

Which said contract was then and there signed by said plaintiff by the name and style of P. C. Boylan, and was also signed on behalf of said carriers, to wit, by George H. Daniels, general ticket agent, and was witnessed by one H. C. Keeran, and to which said principal general ticket six special coupon tickets were annexed as follows:

1. One coupon for the passage from said Chicago to St. Louis, in the State of Missouri.

2. One coupon for the passage from said St. Louis to Malvern, in the State of Arkansas.

3. One coupon for the passage from said Malvern to Hot Springs, in said State of Arkansas.

4. One coupon for the return journey from said Hot Springs to said Malvern.

5. One coupon for the return journey from said Malvern to said St. Louis.

6. One coupon for the return journey from said St. Louis to Chicago.

All which matters and things will more fully and at large appear upon the production and exhibit of said principal ticket and coupons, which the said plaintiff will require the said defendant to do before or upon the trial of this case.

And whereas also afterwards, to wit, on March 19th, A. D. 1882, the said plaintiff, having complied with and performed all and singular the conditions of said contract on his part to be done, departed from said Chicago and made the outward journey to said Hot Springs, for which said ticket was issued, and in due course arrived safely at the last-named place, according to the said contract for his transportation thereto.

And whereas also afterwards, to wit, on April 19th, A. D. 1882, at said Hot Springs, the said plaintiff desired and determined to return to said Chicago and soon thereafter to proceed to the State of California, there to engage in important business, as is hereafter more fully set forth; and thereupon said plaintiff proceeded to make his preparations for said return, and in the hurry thereof he did not notice or remember that his said ticket was required to be dated, signed, and stamped at said Hot Springs not more than five days before the day on which said plaintiff would arrive in said Chicago on his said return journey thereto.

And so said plaintiff presented his said ticket without having been so signed, dated, and stamped to the baggage agent of
13 said Hot Springs Railroad Company at said Hot Springs, with his baggage, and requested said agent to give him a check for said baggage to said Chicago, and thereupon said agent inspected said ticket and accepted the same as good and sufficient, and thereupon gave said plaintiff a check for said baggage as so requested; and said plaintiff avers that if said baggage agent had then refused to accept said ticket and give said check, or had in any way called the attention of said plaintiff to the omission to have said ticket so dated, signed, and stamped, it would have been in the power of the said plaintiff to have the said omission supplied; and said plaintiff further avers that in such case he would accordingly, without objection or delay, have caused said omission to be fully supplied.

And the said plaintiff also avers that his said baggage was afterwards and in due course actually carried under said check from said Hot Springs to said Chicago, and that the same was upon the delivery of said check to him wholly taken out of his custody and control, and that he could not regain the same, except upon the presentation of said check at the place of arrival in said Chicago after his return thereto.

And thereupon afterwards, to wit, on the day and year last aforesaid, at Hot Springs aforesaid, the said plaintiff went to the
14 gate of entrance to the train of cars of said Hot Springs Railroad Company in which he desired and intended to take said return passage to Chicago, and there again presented the same ticket, in the same condition and with the same omissions as when it was presented to said baggage agent, to another agent of said Hot Springs Railroad Company, who was then and there in charge of

said entrance and whose duty it then and there was to refuse admission to every person who did not have a ticket entitling him to carriage in the cars of the train next about to start on its journey; and the said last-mentioned agent then and there also inspected said ticket and accepted the same as good and sufficient to entitle the said plaintiff to transportation in and by said train from said Hot Springs to said Chicago, and thereupon admitted said plaintiff, and he went to said train and took a seat in one of the cars thereof, and soon thereafter said train left said Hot Springs and proceeded on its journey to said Malvern, whereby the said defendant put it wholly out of the power of said plaintiff to supply said omissions.

And the plaintiff avers that if said gate agent had rejected said ticket or objected thereto said plaintiff then could and immediately would have caused said omissions to be fully supplied.

15 And said plaintiff also avers that, having so as aforesaid accepted said ticket and checked his baggage and admitted him to said train and carried him away from the place where said ticket was required to be so dated, signed, and stamped, and thereby put it out of the power of said plaintiff to supply said omissions, it thereupon and thereby became and was the duty of said defendant to carry and transport said plaintiff over its said line without any such signing, dating, or stamping of said ticket, and thereupon and thereby the said defendant became and ever since has been and still is wholly estopped to set up and insist upon all or any of the matters and things so as aforesaid omitted from said ticket.

And thereupon and in consideration of the premises the said defendant then and there undertook and promised not to object to or reject said ticket for or on account of all or any of the matters omitted therefrom as aforesaid.

And said plaintiff avers that he was at all times ready and willing and never refused to sign his name and identify himself whenever called upon to do so by any conductor or agent of any of the lines of railroad included in said journey, but that no such agent or conductor ever asked or required any such identification of said plaintiff before the breach of said contract of car-

16 riage as is hereinafter set forth.

Nevertheless the said defendant, not regarding its said promises, undertakings, and duties toward said plaintiff, but wilfully and maliciously contriving and intending to wrong and injure, oppress and damage, the said plaintiff, did not nor would well and safely continue to transport and carry him over its said line of railroad on his said return journey to Chicago on the day and year last aforesaid, but, on the contrary, the said defendant, by its conductor in charge of said train, wholly disregarded its said contract, and rejected and refused to accept said ticket as good and sufficient, and at Lawrence, in said State of Arkansas, said defendant, in breach of said contract, caused said plaintiff to be expelled from said train with great force and violence, and also in breach of said contract caused him to be violently beaten, bruised, wrenched, stamped upon, and maltreated, whereby he was greatly injured in his bodily health

and strength, and by reason thereof became and was sick and disabled for a long space of time, to wit, from the date of said expulsion to the bringing of this suit.

And said plaintiff avers that by reason of the injuries aforesaid and the sickness thereby caused he has been put to great trouble, pain, and expense, and that the bodily injuries so as afore-
17 said inflicted by said defendant upon said plaintiff have been and are continuous, and still constitute an active cause of injury and damage to his bodily health and strength and his ability to transact business and perform labor of any kind.

And said plaintiff also avers that he has been compelled to expend in and about his said injuries and the sickness thereby caused a large sum of money, to wit, the sum of five thousand dollars, and will hereafter also be compelled to expend further large sums to the amount of five thousand dollars more.

And said plaintiff also avers that the bodily injuries so as aforesaid inflicted upon him by said defendant have damaged him to a large amount, to wit, the sum of forty thousand dollars, and that said injuries are so serious and continuous that a further damage will accrue therefrom to the amount of forty thousand dollars more.

And the said plaintiff also avers that by reason of the breach of said contract of carriage as aforesaid by said defendant he, the said plaintiff, has suffered the following special damage, to wit: That prior to his said expulsion from said train said plaintiff had been of strong and robust health and vigor and capable of performing and enduring a large amount of severe and continuous labor in
18 the transaction of business, and thereby of earning large sums of money from year to year.

And prior to said expulsion said plaintiff had for many years resided at San Francisco, in California, and at Gold Hill, in Nevada, and had been engaged in divers gold and silver mining enterprises, and had large gains and profits thereby.

And that a short time prior to his said journey to said Hot Springs said plaintiff had been informed of some then recent developments of some of the said mining interests in Nevada, and had formed a plan of going to said San Francisco, upon his return from said Hot Springs, and of there engaging in dealing in the stocks of the mines representing said interests.

And said plaintiff also avers that soon after his return to Chicago from said Hot Springs, to wit, on or about May 1st, 1882, said plaintiff, in pursuance of said plan, went again to said San Francisco for the purpose above stated; but upon his arrival there he found himself so injured by the ill-treatment and violence used by said defendant in his said expulsion, and suffered such severe bodily pain by reason thereof, that he was wholly disabled from carrying his said plan into effect or of engaging — any other business, but was compelled to go away from said San Francisco and submit to
19 medical treatment and devote his time altogether to the recovery of his health, which has never yet been and said plaintiff fears will never be fully restored.

And so said plaintiff wholly lost and was deprived of the oppor-

tunity of carrying into effect the plan aforesaid and of making all or any of the gains and profits that he would otherwise have derived therefrom.

And said plaintiff also avers that the sole and only cause why he did — make and realize said gains and profits was the aforesaid injuries so as aforesaid inflicted on him by said defendant; and said plaintiff further avers that the amount of the special loss and damage which he suffered by being so deprived of the gains and profits aforesaid was not less than forty thousand dollars, all which ought, of right and according to law, to be paid and made good by said defendant.

And the said plaintiff also avers that after his said expulsion from said train he was compelled to and did return from said Lawrence to said Hot Springs, and was there compelled to have his said ticket dated, signed, and stamped as aforesaid; and thereupon afterwards said plaintiff returned to said Chicago, and during his journey thereto surrendered and delivered to the proper conductor the
20 ticket aforesaid and all the return coupons annexed thereto, the outgoing coupons having been surrendered on the journey from said Chicago as aforesaid, by means of which said return to said Hot Springs said plaintiff suffered injurious exposure and was further vexed, annoyed, and damaged, and put to further expense.

And the plaintiff avers that all and singular the injuries, damages, and losses in this declaration specified were and are the direct result of the wrongful acts of said defendant in breach of its said contracts, agreements, promises, and undertakings to and with said plaintiff, and that each and every of said injuries, damages, and losses could and, in fact, would have been wholly avoided and escaped if the said contracts, agreements, promises, and undertakings had been well and faithfully kept and performed by and on the part of said defendant.

And the said plaintiff further avers that the said requirement that he should have said ticket so as aforesaid signed, dated, and stamped at said Hot Springs was wholly unreasonable, unlawful, and void and formed no valid part of the contract of carriage whereon this suit is brought.

And the said plaintiff further avers that his said expulsion from said car was wholly unwarranted, unreasonable, unlawful, and excessive and constituted a breach of the contract of carriage
21 whereon this suit is brought, notwithstanding the omission of said plaintiff to have said ticket signed, dated, and stamped at said Hot Springs.

In consideration of all which injuries and damages so as aforesaid inflicted and done by said defendant upon and to said plaintiff and of the duty of said defendant to repair, compensate, and make good the same, the said defendant afterwards, to wit, on the 22nd day of February, A. D. 1887, at Chicago, in the district aforesaid, undertook and promised well and faithfully to pay to said plaintiff the sum of forty thousand dollars on request.

Second Count.

And whereas, also, heretofore, to wit, on or about March 18th, A. D. 1882, at Chicago, in the district aforesaid, the said defendant, for a certain sum of money theretofore paid therefor, undertook and promised, in and by a certain other like ticket, well and faithfully to carry and transport the said plaintiff on a certain other journey from said Hot Springs, in the State of Arkansas, to Malvern, in said State, when afterwards and within the space of fifty days then next following thereto requested.

And whereas afterwards and within said term of fifty days, to wit, on or about April 19th, A. D. 1882, at said Hot Springs, the said plaintiff requested said carriage and transportation of and from the said defendant; and whereas thereupon, to wit, on the day
22 and year and at the place last aforesaid, the said defendant received the person of said plaintiff into a railroad car, then and there destined to be duly moved and transported to said Malvern, and moved said car out of said Hot Springs on its journey to said Malvern.

But on arriving at Lawrence, a station between said Hot Springs and said Malvern, the said defendant, not regarding its promise and undertaking aforesaid nor its duty to said plaintiff in the premises, nevertheless, at said Lawrence, on the day last aforesaid, unlawfully, unjustly, violently, and abusively caused said plaintiff to be expelled and put out of said car and to be greatly and dangerously bruised, beaten, wrenched, and torn by the agents and servants of said defendant, whereby said plaintiff was put to great expense and suffered much pain and anguish and lost large gains and profits in business that he would otherwise have made, all of which is to the damage of said plaintiff to the amount of forty thousand dollars.

Whereby the said defendant became and then and there was and thence hitherto hath been and still is liable to pay to said plaintiff the said sum of forty thousand dollars in this count mentioned; and thereupon and in consideration thereof the said defendant then and there further undertook and promised to pay the same sum to the said plaintiff on request.

23 *Third Count.*

And whereas, also, heretofore, to wit, on or about February 22nd, A. D. 1887, at Chicago, in said district, in consideration of the facts that said defendant had theretofore unlawfully and with great force and violence expelled said plaintiff from one of its cars at Lawrence, in the State of Kansas, to wit, on or about April 19th, A. D. 1882, at Chicago, in the district aforesaid, and had thereby greatly bruised and injured and damaged said plaintiff, and that the injuries of said plaintiff's person thereby inflicted had continued to be active causes of disease and disability of the plaintiff from the date last aforesaid until the day first in this count mentioned, and that said injuries also then were and would probably long continue to be such con-

tinuing causes of disease, disability, and damage to said plaintiff, and that the damage therefrom suffered by said plaintiff in his person, business, money, and means of support would amount to the sum of forty thousand dollars and upwards: Thereupon, to wit, on the day and at the place in this count first mentioned, — undertook and promised the plaintiff to pay him the said sum of forty thousand dollars when thereunto afterwards requested.

General Breach.

24 Nevertheless the said defendant, although often requested to pay the said several sums of money in this declaration mentioned, hath not paid the same nor any or either of them, nor any part thereof, but to do so hath wholly neglected and refused and still doth altogether neglect and refuse, to the damage of the plaintiff to the sum of forty thousand dollars.

Wherefore he brings suit, &c.

LYMAN M. PAINE,
Att'y for Pl'ff.

(Endorsed:) Filed May 12, 1887. Wm. H. Bradley, clerk.

25 Afterwards, to wit, on the twenty-fourth day of June, 1887, came the defendant, by its attorneys, and filed in said clerk's office its demurrer to the declaration in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States, to the July Term, A. D. 1887.

PATRICK C. BOYLAN
vs.
THE HOT SPRINGS RAILROAD COMPANY. } Assumpsit.

And now comes the defendant, The Hot Springs Railroad Company, by G. W. & J. T. Kretzinger, its attorneys, and enters a special and limited appearance for said defendant, not hereby waiving its right to plead to the jurisdiction of this court, and says that the declaration filed in the above-entitled cause and each count thereof is insufficient in law, and for grounds of special demurrer says:

1. The said plaintiff does not show a performance on his part of the special contract in said declaration and each count thereof mentioned which entitled him to a return passage or transporta-
26 tion on or over the road of the defendant.

2. That it is not shown in or by said declaration or either count thereof that the baggage-master of the defendant company

had any authority by any act to waive or in anywise change the terms and conditions of said contract, as stated and set forth in said declaration and each count thereof.

3. The act- of the baggage-master of said defendant company in said declaration and each count thereof recited do not and cannot in law bind or affect the defendant, and cannot and do not in any sense constitute a waiver of the performance in said contract in said declaration and each count thereof mentioned by and on the part of said plaintiff, as herein written.

4. The acts or doings of the keeper at the entrance *and* of said defendant company which led to the train of cars in said declaration and each count thereof mentioned do not and cannot in law have the effect pleaded by said plaintiff, and therefore this defendant did not waive and is not estopped to insist upon the full performance of said contract by said plaintiff in order to entitle him to the use of said ticket on his return from Hot Springs to the city of Chicago.

5. The conductor of the defendant company, to whom said
27 ticket was presented by said plaintiff, had no authority to waive on the part of this defendant any requirement in the contract endorsed upon said ticket or to excuse the non-performance thereof or any part thereof by said plaintiff.

6. This defendant is not liable in law for the remote damages claimed in said declaration and each count thereof.

7. The agency of the company issuing and selling said ticket to said plaintiff in the city of Chicago is not sufficiently averred and set forth.

8. Wherefore and for other defects and insufficiencies appearing upon the face of said declaration and each and every count thereof this defendant prays judgment if he ought to be required to further plead or answer thereto.

THE HOT SPRINGS RAILROAD COMPANY,
By G. W. & J. T. KRETZINGER,
Its Attorneys.

Endorsed: Filed June 24, 1887. Wm. H. Bradley, clerk.

28 Afterwards, to wit, on the twenty-third day of January, 1888, in the December term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

PATRICK C. BOYLAN
vs.
THE HOT SPRINGS RAILROAD CO. } Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the defendant to the declaration filed

herein, and after hearing the arguments of the counsel the court takes the same under advisement.

Afterwards, to wit, on the sixth day of February, 1888, in the December term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

PATRICK C. BOYLAN
vs.
THE HOT SPRINGS RAILROAD COMPANY. } Assumpsit.

The court, having considered and being now fully advised upon the demurrer of the defendant to the declaration herein, overrules the same, with leave to said defendant to plead specially in ten days.

29 Afterwards, to wit, on the sixteenth day of February, 1888, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States.

PATRICK C. BOYLAN
vs.
HOT SPRINGS RAILROAD CO.

It is hereby stipulated that the time to plead to the merits in the above cause be extended to March 15th, 1888, and that the defendant will thereafter unite with the plaintiff to speed the final hearing of said cause.

LYMAN M. PAINE,
Plaintiff's Attorney.
G. W. & J. T. KRETZINGER,
Defendant's Attorney.

Dated Feb'y 13th, 1888.

(Endorsed:) Filed Feb. 16, 1888. Wm. H. Bradley, clerk.

30 Afterwards, to wit, on the fifteenth day of March, 1888, came the defendant, by its attorneys, and filed in said clerk's office its pleas in said entitled cause; which said pleas are in the words and figures following, to wit:

Pleas.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States.

THE HOT SPRINGS RAILROAD COMPANY }
ats. }
PATRICK C. BOYLAN. }

(1.) And the defendant, The Hot Springs Railroad Company, by G. W. & J. T. Kretzinger, its attorneys, comes and defends the wrong and injury when, etc., and says that it did not promise or undertake in manner and form as the plaintiff has above thereof complained against it; and of this it puts itself upon the country, etc.

G. W. & J. T. KRETZINGER,
Defendant's Att'ys.

(2.) And for a further plea in this behalf the defendant says that the plaintiff ought not to have his aforesaid action against it, the defendant, because it says that after the making of the several
31 promises in said declaration and each count thereof mentioned, and before the commencement of this suit, to wit, on, etc., in, etc., the defendant did carry the plaintiff over its road and the entire length of its road from Hot Springs, in the State of Arkansas, to the place written in the coupon attached to the ticket or contract in the said declaration and each count thereof mentioned, and that the same was done at the instance and request of said plaintiff in full satisfaction and discharge of the said several promises in said declaration and each count thereof mentioned, and in full performance of the said terms and conditions in said ticket and said coupon in said declaration and each count thereof referred to; and of this the defendant puts itself upon the country, etc.

G. W. & J. T. KRETZINGER,
Defendant's Att'ys.

(3.) And for a further plea in this behalf the defendant says that the plaintiff ought not to have his aforesaid action against it, the defendant, because it says that after the making of the several promises in said declaration mentioned and before the commencement of this suit and after said plaintiff had identified himself as the original purchaser to the satisfaction of the authorized agent of the
32 Hot Springs railroad at Hot Springs within the time in said ticket mentioned and after the same had been officially dated and signed in ink and duly stamped by said agent at Hot Springs, as was and is required in said ticket, in said declaration and each count thereof mentioned, said plaintiff presented on board of the cars of this defendant, at Hot Springs, in said State of Arkansas,

said ticket, and this defendant then thereupon and at the request of said plaintiff carried said plaintiff from said Hot Springs to Malvern, in the State of Arkansas, and defendant avers that by so doing the defendant fully performed said contract in all things and thereby fully satisfied and discharged each and all of the promises and undertakingsin said declaration and each count thereof mentioned; and of this the defendant puts itself upon the country, etc.

G. W. & J. T. KRETZINGER,
Defendant's Att'ys.

(4.) And for a further plea in this behalf the defendant says that the plaintiff ought not to have his aforesaid action against it, the defendant, because it says that when said ticket in said declaration and each count thereof described was first presented by said plaintiff, as in said declaration and each count thereof mentioned,
33 to the conductor of this defendant said plaintiff had not complied with the conditions precedent in said ticket contract mentioned, so as to entitle him to be carried and transported from Hot Springs to Malvern, in the State of Arkansas, and that at the time said ticket was so presented by said plaintiff as aforesaid said ticket did not constitute a contract between said plaintiff and this defendant under and by virtue of which the said plaintiff was entitled to be carried or transported under and by virtue of said ticket from said Hot Springs to Malvern, nor was defendant under any obligation to carry said plaintiff from said Hot Springs to Malvern; and defendant further avers that after said plaintiff left the car and train of this defendant at, etc., as in said declaration alleged, said plaintiff returned to Hot Springs and complied with the condition precedent in said ticket contract written, to wit, identified himself as the original purchaser of said ticket to the satisfaction of the authorized agent of this defendant at Hot Springs within the time in said ticket mentioned, and that upon such identification the same was officially dated, signed, and duly stamped by said agent of this defendant at Hot Springs, and then and thereupon and not before then said plaintiff became entitled to be carried and transported by defendant under and by virtue of said
34 ticket from said Hot Springs to Malvern as aforesaid, and that thereafter and before the commencement of this suit and within the time in said ticket written defendant avers that said plaintiff did enter in one of the passenger coaches of this defendant at Hot Springs and requested that he be transported, taken, and carried from said Hot Springs to Malvern by this defendant, which this defendant then and there did, and defendant avers that by so doing defendant then and there fully performed all of the terms and conditions in said ticket contract which it became liable to perform upon the said compliance on the part of the said plaintiff with the terms and conditions therein written to be performed by him, and that said plaintiff then and there accepted said performance on the part of this defendant as a full compliance with the terms and obligations of said ticket in said declaration mentioned; and defendant further avers that having fully performed said contract as afore-

said upon the request of said plaintiff as aforesaid, and said plaintiff having accepted the performance thereof as aforesaid before the commencement of this suit, no breach of said contract can be maintained against this defendant by said plaintiff; and of this the defendant puts itself upon the country, etc.

G. W. & J. T. KRETZINGER,
Defendant's Att'ys.

35 (5.) And for a further plea in this behalf the defendant says that the plaintiff ought no- to have its aforesaid action against it, the defendant, because it says that it, the defendant, did within the life of said contract, and according to the terms and conditions therein written and at the request of said plaintiff, carried said plaintiff from Hot Springs to Malvern, Arkansas, and that defendant did fully perform on its part said contract according to the terms and conditions therein written; and of this the defendant puts itself upon the country, etc.

G. W. & J. T. KRETZINGER,
Defendant's Att'ys.

(6.) And the defendant, by G. W. & J. T. Kretzinger, its attorneys, comes and defends the force and injury when, etc., and says that it is not guilty of the said supposed trespasses above laid to its charge, or any or either of them, in manner and form as the plaintiff has above thereof complained against it; and of this the defendant puts itself upon the country, etc.

G. W. & J. T. KRETZINGER,
Defendant's Att'ys.

(7.) And for a further plea in this behalf the defendant says that the plaintiff ought not to have his aforesaid action against
36 it, the defendant, because it says that this defendant is a railroad corporation incorporated in and within the State of Arkansas and organized and existing under and by virtue of the laws of said State; that defendant owns and operates a line of railroad wholly within said State of Arkansas and does not own or operate a railroad outside of said State, and that the supposed grievances in said declaration mentioned occurred in said State of Arkansas; that the statute of limitations enacted by the Legislature of the State of Arkansas, and that controls the bringing of actions within said State, and that limits the time within which such actions shall be brought, provides that all actions founded upon tort, trespass, or injury to the person shall be brought within three years after the commission or happening of said tort, trespass, or injury; that the said statute of the State of Arkansas so limiting said actions as aforesaid is embraced in the first paragraph of section 4478 of chapter 97, entitled "Limitations" of the statute of Arkansas, being in the words and figures following, to wit:

"SECTION 4478. The following actions shall be commenced within three years after the cause of action shall accrue, and not after:

First. All actions founded upon any contract or liability, express or implied, not in writing."

37 And defendant avers that this, said plaintiff's, action against this defendant, or so much thereof as seeks to recover damages against this defendant for the eviction of said plaintiff from the car or train of this defendant, as in said declaration and each count thereof alleged, is for a "liability" "not in writing," and that the same, not having been brought within three years from the date of said eviction, *the same* is barred by the said statute of the State of Arkansas, and was so barred before the commencement of this suit, and that no action therefor or thereon could have been brought or maintained in said State of Arkansas against this defendant on the date of the commencement of this suit.

And defendant further avers that it is provided in and by the statute of the State of Illinois, to wit, section 20 of chapter 83, entitled "Limitations," to wit, that "when a cause of action has arisen in a State or Territory out of this State or in a foreign country, and by the laws thereof an action thereon cannot be maintained by reason of a lapse of time, an action thereon shall not be maintained in this State." And this the defendant is ready to verify; wherefore it prays judgment if the plaintiff ought to have his aforesaid action against it, etc.

G. W. & J. T. KRETZINGER,
Defendant's Att'ys.

38 (8.) And for a further plea in this behalf the defendant says that the plaintiff ought not to have his aforesaid action against it, the defendant, because it says that it, the defendant, is a corporation organized and existing under and by virtue of the laws of the State of Arkansas; that it owns and operates a railroad wholly within said State of Arkansas; that it does not own or operate a railroad in the State of Illinois or in any other State or Territory except the said State of Arkansas; that the injuries complained of occurred wholly within the State of Arkansas, and said plaintiff was entitled and had full right to bring suit therefor in said State.

And defendant further avers that the action of said plaintiff against defendant for and on account of the forcible eviction of plaintiff from the car or train of this defendant is barred by the laws of the State of Arkansas unless brought within one year after the happening thereof, said time within which said action must be brought being fixed by the first paragraph of section 4479 of chapter 97 of the statute of the State of Arkansas, entitled "Limitations," which provides as follows:

"SECTION 4479. The following actions shall be commenced within one year after the cause of action shall accrue, and not after: First, all actions for criminal conversation, assault and battery, and false imprisonment."

39 And defendant avers that this provision of the statute of the State of Arkansas bars all actions for damages resulting from physical force or for any damage done to the person of another in the manner in said declaration and each count thereof alleged, and that this suit was not brought by the plaintiff against this defendant within one year from the date of said supposed grievances

and injuries in said declaration and each count thereof mentioned; that the commencement of said action at the date when the same was commenced being barred by the said laws of the State of Arkansas, the commencement thereof is likewise barred in the State of Illinois by virtue of section 20 of the statute of "limitations" of the State of Illinois, then and now in force, which provides: "When a cause of action has arisen in a State or Territory out of this State or in a foreign country, and by the laws thereof an action thereon cannot be maintained by reason of a lapse of time, an action thereon shall not be maintained in this State." And this the defendant is ready to verify; wherefore it prays judgment if the plaintiff ought to have his aforesaid action against it, etc.

G. W. & J. T. KRETZINGER,
Defendant's Att'ys.

(9.) And for a further plea in this behalf the defendant says that the plaintiff ought not to have his aforesaid action against
40 it, the defendant, because it says that, while this defendant is a corporation organized and existing under the laws of the State of Arkansas and operates and maintains a line of railroad wholly within said State of Arkansas, the president of this defendant, to wit, Joseph Reynolds, upon whom service of summons in this case has been had, has had an office in the city of Chicago before, at, and ever since the happening of said supposed grievances in said declaration and each count thereof mentioned, and that this suit might have been commenced by service of summons upon said Joseph Reynolds in the city of Chicago, as has been done, at any time after the happening of said supposed grievances in said declaration and each count thereof mentioned.

And defendant further avers that said supposed action or cause of action in said declaration and each count thereof mentioned, to wit, the alleged forcible eviction of said plaintiff from the car or train of this defendant and the supposed personal injuries inflicted upon said plaintiff by this defendant or its agents and the supposed personal injuries and damages received and suffered by said plaintiff as a result thereof, did not occur or accrue to the said plaintiff at any time within two years next before the commencement
41 of this suit in the manner and form as the plaintiff has above complained against it, the defendant, and therefore the bringing and maintenance thereof are barred by the statute of the State of Illinois; and this the defendant is ready to verify. Wherefore it prays judgment if the plaintiff ought to have his aforesaid action against it, etc.

G. W. & J. T. KRETZINGER,
Defendant's Att'ys.

(10.) And for a further plea in this behalf the defendant says that the plaintiff ought not to have his aforesaid action against it, the defendant, because it says that this defendant is a railroad corporation, incorporated, organized, and existing under and by virtue of the laws of the State of Arkansas, and that defendant, as a corpora-

tion, resides wholly and exists only within said State of Arkansas; that it owns and operates a line of railroad wholly within said State of Arkansas and does not own or operate a railroad outside of said State, and that the supposed grievances in said declaration mentioned occurred in said State of Arkansas; that the statute of limitations enacted by the Legislature of the State of Arkansas and that controls the bringing of actions within said State and that limits the time within which such actions shall be brought provides that

42 all actions founded upon any contract or liability not evidenced by writing shall be brought within three years after the right accrues, and not after; that the said provision of said statute of the State of Arkansas so limiting said actions as aforesaid is embraced in the first paragraph of section 4478 of chapter 97, entitled "Limitations" of the State of Arkansas, being in the words and figures following, to wit:

"SECTION 4478. The following actions shall be commenced within three years after the cause of action shall accrue and not after: First, all actions founded upon any contract or liability, express or implied, not in writing."

And defendant further avers that said supposed action or cause of action in said declaration and each count thereof mentioned did not accrue to the plaintiff at any time within three years next before the commencement of this suit in the manner and form as the plaintiff has above complained against it, the defendant, and therefore the bringing and maintenance of said suit are barred by the said statute of the State of Arkansas; and this the defendant is ready to verify.

Wherefore it prays judgment if the plaintiff ought to have his aforesaid action against it, etc.

G. W. & J. T. KRETZINGER,
Defendant's Attorneys.

(Endorsed:) Filed M'ch 15, 1888. Wm. H. Bradley, clerk.

43 Afterwards, to wit, on the twenty-third day of March, 1888, came the plaintiff, by his attorney, and filed in said clerk's office his joinder to the first plea and demurrer to the second, third, fourth, fifth, ninth, and tenth pleas and motion to strike from the files the sixth, seventh, and eighth pleas in said entitled cause; which said joinder, demurrer, and motion are in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court.

PATRICK C. BOYLAN
vs.
THE HOT SPRINGS RAILWAY COMPANY. } Assumpsit.

And now comes again the said plaintiff, and as to the plea of said

defendant by it first above pleaded, wherein said defendant puts itself upon the country, doth the like.

And as to the second, third, fourth, fifth, ninth, and tenth pleas of said defendant said plaintiff doth demur thereto because the said pleas and each and every of them are not sufficient in law.

And as to the sixth, seventh, and eighth pleas of said defendant said plaintiff now here moves the court to strike the same
44 from the files because the said pleas and each and every of them appear to be pleas in an action of trespass, and do not assume to answer the cause of action in plaintiff's declaration set forth.

LYMAN M. PAINE,
Attorney for Plaintiff.

(Endorsed:) Filed M'ch 23, 1888. Wm. H. Bradley, clerk.

45 Afterwards, to wit, on the fifteenth day of May, in the adjourned May term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

PATRICK C. BOYLAN
vs.
THE HOT SPRINGS RAILROAD CO. } Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the plaintiff to the second, third, fourth, fifth, ninth, and tenth pleas filed herein, and after hearing the arguments of the counsel the court sustains said demurrer, and the plaintiff, by his attorney, moves the court to strike from the files the sixth, seventh, and eighth pleas herein, and after hearing the arguments of the counsel the court sustains said motion and orders that said sixth, seventh, and eighth pleas be stricken from the files, and on motion of the defendant, by his attorney, leave is given it to file additional pleas herein by to-morrow morning.

46 Afterwards, to wit, on the sixteenth day of May, 1888, came the defendant, by its attorneys, and filed in said clerk's office its amended and additional pleas in said entitled cause; which said pleas are in the words and figures following, to wit:

Amended and Additional Pleas.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

In the Circuit Court of the United States.

PATRICK C. BOYLAN
vs.
THE HOT SPRINGS RAILROAD COMPANY.

And for a further plea in this behalf, leave of court first being had and obtained to file an amended and additional plea herein, the defendant says that the plaintiff ought not to have his aforesaid action against it, the defendant, because it says that this defendant is a railroad corporation incorporated in and within the State of Arkansas and organized and existing under and by virtue of the laws of this State; that it owns and operates a line of railroad wholly within the said State of Arkansas and does not own or operate a railroad outside of said State; that the said supposed grievances in said
47 declaration mentioned occurred in said State of Arkansas; that the statute of limitations enacted by the Legislature of the State of Arkansas and that controls the bringing of actions withn said State and that limits the time within which such actions shall be brought provides, among other things:

"SECTION 4478. The following actions shall be commenced within three years after the cause of action shall accrue and not after: First. All actions founded upon any contract or liability, express or implied, not in writing."

And defendant avers that at the time the said plaintiff was ejected from the car or train of this defendant, as in said declaration and each count thereof alleged, there was no contract in writing between said plaintiff and said defendant, and signed by them and each of them, which constituted the ticket or evidenced the right of said plaintiff to ride upon the car or train of this defendant at the time said eviction occurred. An action thereon not having been brought within three years from the date of said eviction, the same is barred by said statute of the State of Arkansas, and was so barred before the commencement of this suit, and that no action therefore or thereon could be brought or maintained in said State of Arkansas against this defendant at the date of the commencement of this suit.

And defendant further avers that it is provided in and by
48 the statute of the State of Illinois, to wit, section 20 of chapter 85, entitled "Limitations," to wit, "that when a cause of action has arisen in a State or Territory out of the State or in a foreign country, and by the laws thereof an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this State;" and this the defendant is ready to verify. Wherefore it prays judgment if the plaintiff ought to have its aforesaid action against it, etc.

G. W. & J. T. KRETZINGER,
Attorneys for Def't.

And for a further plea in this behalf, by leave of court first had and obtained, the defendant says, as to that part of the declaration and each count thereof hereinafter specified, that the plaintiff ought not to have his aforesaid action against it, the defendant, for and on account of any personal injuries received by the said plaintiff, as in said declaration and each count thereof alleged, because it says that while this defendant is a corporation organized and existing under the laws of the State of Arkansas, and operates and maintains a line of railroad wholly within said State of Arkansas, the president of this defendant, to wit, Joseph Reynolds, upon whom service of summons in this case has been had, has had an office in the city of Chicago before, at, and ever since the happening
49 of said supposed grievances in said declaration and each count thereof mentioned, and that this suit might have been commenced by service of summons upon the said Joseph Reynolds in the city of Chicago, as has been done, at any time after said supposed personal injuries to the plaintiff in said declaration and each count thereof mentioned.

And defendant further avers that the said supposed personal injuries inflicted upon the said plaintiff by this defendant or its agent, as in said declaration and each count thereof mentioned, and the supposed personal injuries and damages received and suffered by said plaintiff as the result of his eviction from the car or train of this defendant, as in said declaration and each count thereof alleged, did not occur or accrue to the said plaintiff at any time within two years next before the commencement of this suit, in the manner and form as the plaintiff hath above complained against it, the defendant, and therefore the right of said plaintiff to recover in this action for and on account of said personal injuries is barred by the statute of the State of Illinois; and this the defendant is ready to verify. Wherefore it prays judgment if the plaintiff ought to have his aforesaid action for and on account of said personal injuries against it, the defendant, etc.

G. W. & J. T. KRETZINGER,
Attorneys for Def't.

50 (Endorsed:) Filed May 16, 1888. Wm. H. Bradley, clerk.

Afterwards, to wit, on the seventeenth day of May, 1888, came the plaintiff, by his attorney, and filed in said clerk's office his demurrer to the first and second amended and additional pleas in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of the United States for the Northern District of Illinois.

PATRICK C. BOYLAN
vs.
HOT SPRINGS RAILROAD COMPANY. } Assumpsit.

And now comes said plaintiff; and, as to the first and second amended and additional pleas by said defendant filed on May 16, 1888, said plaintiff doth demur thereto, and for cause of demurrer said plaintiff says that said pleas, respectively, are not sufficient in law.

LYMAN M. PAINE,
Att'y for Plaintiff.

(Endorsed:) Filed May 17, 1888. Wm. H. Bradley, clerk.

51 Afterwards, to wit, on the twenty-ninth day of October, in the adjourned October term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

PATRICK C. BOYLAN
vs.
THE HOT SPRINGS RAILROAD COMPANY. } Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the plaintiff to the amended and additional pleas filed herein; and, after hearing the arguments of the counsel, the court sustains said demurrer.

52 Afterwards, to wit, on the seventeenth day of December, in the December term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Judgment.

PATRICK C. BOYLAN
vs.
THE HOT SPRINGS RAILROAD COMPANY. } Assumpsit.

Now come the parties, by their attorneys, and upon issue joined herein, thereupon comes a jury of good and lawful men, to wit, G.

A. Gruppe, George D. Bryant, Dennis Ryan, J. S. Bartlett, John R. Hayes, George Wright, George Martin, W. O. Osgood, George Dean, M. T. Trowbridge, W. H. Humphrey, and Charles Kobo, who were all duly elected, tried, and sworn, well and truly to try said issue; and, after hearing the evidence and the arguments of the counsel and receiving the instructions of the court to return a verdict for the defendant, the jury return the following verdict, to wit: We, the jury, find the issues for the defendant. It is thereupon considered and adjudged by the court that said defendant do have and recover of said plaintiff its costs in this behalf expended, and that it have execution therefor.

53 On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

Bill of Exceptions.

Circuit Court of the United States for the Northern District of Illinois.

PATRICK C. BOYLAN
vs.
THE HOT SPRINGS RAILROAD COMPANY.

Be it remembered that on the trial of the above-entitled cause, on the 17th day of December, 1888, at the December term, 1888, of said court, before the Honorable Walter Q. Gresham, judge of the circuit court of the United States, and a jury, the plaintiff, to maintain the issues on his part, introduced the following evidence:

Charles C. Bonney, Esq., for the plaintiff, and George W. Kretzinger, Esq., for the defendant.

PATRICK C. BOYLAN, the plaintiff, was sworn, and, being examined by Mr. BONNEY, testified as follows:

Q. How long have you resided here?
A. Since about the last of July or the first of August, 1882.
Q. Where did you previously reside?
A. In the State of Nevada, at Virginia City, and San Francisco, California.
Q. How long had you been residing on the Pacific coast prior to your removing here?
A. About 20 years; I went to California March, 1862.
54 Q. In what business were you engaged there?
A. Mining and speculating in mining stocks.
Q. You are the plaintiff in this case?
A. Yes, sir.
Q. Look at the paper now shown you and state what it is.
A. That is the last coupon of a round-trip ticket from Chicago to Hot Springs and return.

Q. With the principal part of the ticket attached thereto?
A. Yes, sir.
Q. State where the other coupons are, so far as you know.
A. They were taken up by different conductors between here and Hot Springs and return.

The COURT: Is this the ticket that you bought here with the coupons off?
A. Yes; excepting the last one.
Mr. BONNEY: State whether that ticket was purchased by you on or about March 18, 1882.
A. Yes, sir; it was.
Q. You purchased it at the office of the Wabash road here in this city?
A. I did.
Q. State to the jury what took place on the purchase of the ticket, how much you paid, what was said by you to the agent and the agent to you.

Objected to.
Question withdrawn.

The COURT: How much did you pay for it?
A. $41.50.

Mr. BONNEY: State whether at the time you purchased the ticket the agent who sold it to you here did or did not call your attention to the requirement that it should be signed and stamped at Hot Springs.

55 Objected to upon the ground that it is upon the face of the ticket and it is not necessary for the ticket agent to say anything about it.
The court decided to hear the testimony and instruct the jury as to what weight should be given to it.

A. He did not call my attention to that.
Q. You went to Hot Springs, then, immediately after on this ticket?
A. Yes, sir.
Q. And the Hot Springs road on the outgoing journey accepted this ticket and carried you to Hot Springs?
A. They did.
Q. When did you first actually know that that ticket required you to sign it and have it stamped at Hot Springs?

Objected to upon the grounds, first, that the requirement was plainly printed upon the face of the ticket and the plaintiff was bound to take notice of that and all other conditions; second, that it was not necessary for the ticket agent to advise him of any conditions printed on the ticket.
Objection sustained, and plaintiff thereupon duly excepted.

Q. Tell the jury what transpired when you started to return to Chicago April 19, 1882, at the baggage office.

Objected to on the ground that no statement or action of the baggage-master would constitute a waiver of any of the written conditions of the contract.

The court reserved its decision and received the evidence subject to the objection.

A. I went to the baggage office and asked the baggageman to check the baggage. He asked to see the ticket and I showed it to him. He looked at it and asked where I wished the baggage checked—St. Louis—and I replied, to Chicago, and he punched the ticket and checked the baggage and gave me the checks for it.

56 Defendant's counsel moved to strike out the answer on the grounds already stated.

The court reserved his decision.

Q. State what transpired between you and the gateman.

Objected to upon the ground that no statement or action of the gateman would constitute in any sense a waiver of the written conditions of the contract. The contract expressly prohibited waiver by or through any agent or agents of the defendant company.

The court reserved its decision and allowed the witness to answer subject to this objection.

A. He wanted to see my ticket and I showed it to him and passed through the gate and took my seat in the car.

Q. Did the gateman take the ticket from your hands?

A. I couldn't say that he did.

Defendant's counsel moved to strike out the testimony as to what occurred at the gate. The decision was reserved.

Q. State what transpired when the conductor came through.

A. We went out from the station about three-quarters of a mile and stopped and took on some freight cars. After we had passed that station the conductor commenced working the train, taking the tickets, and he came to me and I showed him my ticket, and he took it and looked at and says, "This is no good." I asked him what was the reason it wasn't good. He said, "You failed to have it stamped at Hot Springs." I replied that the baggageman hadn't said anything to me about it when he checked my baggage, and I didn't know it was necessary. He says, "The baggageman isn't running this train; I am running the train, and you will have
57 to get off and go back to Hot Springs and have it stamped."

I asked if there wasn't some other way that we could fix it—I was very anxious to go through on that train—and he said, "There is no way you can fix it up unless you pay the full fare or get off and go back." I told him I thought there was; I was very anxious to go through on that train on business, and I did not see why we could not fix it up some way and let me go through. I told him I couldn't pay another fare. He wouldn't listen to me. He says there is no way you can fix it up except to go back to Hot Springs.

I told him I couldn't go back to Hot Springs; I wanted to go through. He says, "You get off at the next station." I told him that I would not; that I wanted to go through. He passed on and went to working the train. When he passed by I asked a gentleman opposite me what I had best do. He said he didn't know; it seemed to be rather a hard case, and he thought I was entitled to a ride.

A JUROR: Did the conductor put you off at the first station?

A. We passed one station about three-quarters of a mile outside. They stopped to take on freight cars.

Mr. KRETZINGER: That is only a switch-yard.

The WITNESS: They call it a station, I think. I kept my seat until we got to Lawrence, and the conductor came in and wanted to know if I was going to get out. I replied that I was not. "Well," he said, "I will have to put you off." He made a grab for my overcoat and hand-bag that I had on the inside of the seat. I sat over on them and prevented him from getting hold of
58 them. Then he made a grab for the lapel of my coat, and commenced jerking, and he could not get me out of the seat. He got off an oath then, and said, "Damn you, I will see that I get you out." He went to the front end of the car and got two other men to help him, and as they came in the door a passenger advised me to pull my pistol and defend myself. I made no reply. They came down and caught hold of me, and I took hold of the seat and straightened my legs out under the seat. I was going to stay there if I could. The conductor could not break my hold loose, and he got his foot up and commenced stamping on me, and the other two fellows were working at my feet. They used me so roughly that I had to give way, and as quick as I let go my hold they jerked me right from the seat, and my head fell down in the aisle of the car, and these two fellows who had me by the heels pulled me down through the aisle of the car, my head and shoulders dragging the floor of the car, right off onto the ground. When I got loose I got up and straightened out my ticket, and there were 8 or 10 gentlemen there at the station, and I said, "This isn't treating me right; I think I am entitled to a ride. Here is my ticket, and I paid for it, and I don't deserve this treatment." As I straightened the ticket out I missed the coupon of the Hot Springs road. It was torn off. I accused the conductor then of taking that coupon. He denied it, and said that he didn't have it. Said I, "You must have it; it is gone, and you were the only man that had the ticket, and you certainly must have it. He denied it up and down, and as the train was pulling out of the station the coupon was passed out
59 through the window of the car, and I got it. I took the coupon and pinned it to the balance of the ticket.

Defendant's counsel moved to strike out the answer, and the ruling was reserved.

I washed the blood off my hand. The skin was all torn off. When I got through everybody had gone. I waited there probably half an hour, and went and got my dinner, and took the next train

back to Hot Springs, and I paid another fare going back, and I asked the ticket agent to fix up the ticket, and he told me where to sign my name, and I signed my name there, and he stamped it, and passed it back to me. I then went back and took my seat in the car and waited until the train started for Malvern. When I got to Malvern I felt so tired and broke up that I had to go to bed for four or five hours, and then went to St. Louis, and had to lie over twelve or eighteen hours before I could get to Chicago.

Q. How far is Lawrence from Hot Springs?

A. About 7 miles and a half.

Q. State whether when the conductor came to you, or before he expelled you from the train, he made a demand for any specific sum of fare; and, if so, what.

A. He did not.

Q. State whether he told you what the fare was.

A. He did not.

Q, At what time did you arrive in Chicago?

A. Two or three days afterwards.

Q. How long did you remain here then?

A. About a week.

Q. Where did you go?

A. San Francisco.

Q. How long did you remain on the Pacific coast, then?

60 A. About three months.

Q. State what business you went to the Pacific coast upon.

A. I went there to deal in mining stocks.

Q. State whether you had any immediate business in hand on which you went.

A. I was speculating in mining stock.

Q. State the extent of your operations.

A. I had at times quite large trades—trades to the amount of forty or fifty thousand, and then three or four thousand, or one or two thousand, and running up.

Q. How many years have you been engaged in that business?

A. Since 1865.

Q. State what the condition of your health was when you went to California?

Objected to, and objection sustained.

The COURT: What was it at the time of this occurrence?

A. It was good.

Q. What has been the condition of your health since your expulsion?

The COURT: Let him state how he was injured.

A. My hand was swelled up very much and my arm was black and blue, and my side was black and blue, and I had lumps on the back of my head.

Q. What, if any, injury did your health suffer?

A. When I started for California I thought I felt pretty good, and in crossing the Rocky Mountains I was taken bad with violent pains in my breast and my back. I couldn't raise up in the sleeper.

61 I couldn't rise from my side, and had to raise up on my hands and knees. When I got to San Francisco I felt so bad that I had to leave there; the climate was rather heavy. The air was bad for a person that had any trouble with their lungs or affected in that way.

The COURT: What do you mean—that your lungs were injured?

A. There was terrible pain there, and soreness across the lungs and breast and back and running up my shoulders. I went up to Horbin Springs, Lake county, and stayed there something like 3 weeks; left there and went to Bartlett Springs; stayed there about 7 weeks; then went to San Francisco feeling better.

Q. Tell the jury when you became able to attend to your business.

A. I have never been able to attend to it as I did before this trouble.

Q. State whether your nervous system was injured; and, if so, to what extent.

A. I find that since it happened I have lost action. I can't make my mind up when I want to perform any action on the board, and I found that I would hesitate too long. My ideas were separated, and I couldn't operate on the impulse of the moment. In that way I kept losing. I would get in too late or too soon, or something like that, and I kept working until I got reduced clear down to nothing, and I found that I couldn't operate like I had been doing before this trouble.

Q. State whether this disability to pursue your business was caused by any other matter or thing than the expulsion, so far as you know.

62 Objected to upon the grounds, 1st, the action is in form in assumpsit for breach of contract; therefore evidence of personal injury is not admissable; 2d, the declaration proceeds upon a breach of contract, and it is shown that after the plaintiff performed the condition precedent to his right to ride, namely, appeared at defendant's ticket office at Hot Springs, identified himself, signed the ticket, and the same was stamped and signed by the agent, the plaintiff rode on said ticket to Chicago, and therefore the contract was fully performed; 3rd, plaintiff has not shown that he presented to the conductor a ticket entitling him to ride, and therefore the expulsion was justifiable; 4th, excessive force is not averred in the declaration, and therefore cannot be proven; 5th, evidence of personal injury is wholly inadmissable under the declaration; 6th, it is not shown the expulsion was unlawful or that excessive force was used; 7th, disability must be shown to have resulted from the injury received,

Objection sustained, and exception by plaintiff.

Q. State what would have been probable profits from the business on which you went to California if you had been able in point of health to carry same into effect.

Objected to upon the grounds above set forth, and upon the addi-

tional ground that the profits inquired for are purely speculative and cannot be recovered in the form of damages in this action, nor is the evidence of such damages admissible under the declaration in this case.

Objection sustained; to which ruling of the court plaintiff's counsel excepted.

Q. State what amount of money you were earning per year in the business that you were following when this expulsion took place.

Objected to upon same grounds last stated.
Objection sustained, and plaintiff thereupon excepted.

Q. State to the jury, from the best judgment you can exercise, what amount of annual loss in earnings you have suffered in consequence of this expulsion or the injuries received from this expulsion since it took place.

63 Objected to on the same grounds last stated.
Objection sustained, and plaintiff thereupon excepted.

Q. State to the jury what injury to your business and means of livelihood resulted from your expulsion from the railroad, if any.

Objected to upon the grounds last stated.
Objection sustained, and plaintiff thereupon excepted.

Q. State to the jury what special damage resulted to you from your expulsion from the railroad train, as you have stated.

Objected to upon the same grounds, and also because the question calls for speculative damages.
Objection sustained, and plaintiffs thereupon excepted.

Q. State to what extent you have recovered from the injuries inflicted upon you by your expulsion from the train.

Objected to, and objection overruled.

A. The skin had healed over and the swelling had gone down, and the soreness out of my breast apparently has all gone; but I have spells if I exercise or do any hard labor for a day or so. I am not able to do anything. I require a great deal of rest and better care of myself than I did before.

Q. State to the jury what expenses you incurred for medicine and the attendence of physicians and otherwise in consequence of that injury.

A. I didn't employ any physician.

Q. Did you employ a physician after you returned here?

A. I did not.

Q. State to the jury whether you can estimate the damage to your physical system and health resulting from your expulsion.

64 Objected to on the specific grounds above stated and because not admissible under the pleadings. Objection sustained, and plaintiff thereupon excepted.

Plaintiff's counsel offered in evidence the ticket referred to by the witness, which is as follows, to wit:

Copy of Principal Railway Ticket in Controversy, with Coupon for Passage from St. Louis to Chicago.

Issued by Wabash, St. Louis & Pacific railway. Tourist special contract. Good for one first-class passage to Hot Springs, Ark., and return, when officially stamped on the back hereof and presented with coupons attached. In consideration of the reduced rate at which this ticket is sold, I, the undersigned, agree to and with the several companies over whose lines this ticket entitles me to be carried as follows, to wit:

1st. That in selling this ticket the Wabash, St. Louis & Pacific Railway Company acts as agent and is not responsible beyond its own line.

2nd. That this ticket is not transferable, and no stop-over at any intermediate point will be allowed unless specially provided for by the local regulations of the lines over which it reads.

3rd. That any alteration whatever of this ticket renders it void.

4th. That it is good for going passage only five (5) days from date of sale, as stamped on back and written below.

5th. That it is not good for return passage unless the holder identifies himself as the original purchaser to the satisfaction
65 of the authorized agent of the Hot Springs railroad at Hot Springs, Ark., within fifty-five (55) days from date of sale, and when officially signed and dated in ink and duly stamped by said agent this ticket shall then be good only five (5) days from such date.

6th. That I, the original purchaser, hereby agree to sign my name and otherwise identify myself as such whenever called upon to do so by any conductor or agent of the line or lines over which this ticket reads.

7th. That baggage liability is limited to wearing apparel not exceeding $100 in value.

8th. That the coupons belonging to this ticket will not be received for passage if detached.

9th. That my signature shall be in manuscript and in ink.

10th. That unless all the conditions on this ticket are fully complied with it shall be void.

11th. That I will not hold any of the lines named in this ticket liable for damages on account of any statement not in accordance with this contract made by any employee of said lines.

12th. And it is especially agreed and understood by me that no agent or employee of any of the lines named in this ticket has any power to alter, modify, or waive in any manner any of the conditions named in this contract.

(Signed) ——— ———.

Signature: P. C. BOYLAN.

Witness: H. C. KEERAN.

Date of sale, March 18th, 1882.

GEO. H. DANIELS,
Gen'l Ticket Agent.

66 *Copy of Coupon for Passage from St. Louis to Chicago.*

Issued by Wabash, St. Louis & Pacific r'y.
\+ Wabash, St. Louis & Pacific railway.
——— St. Louis to (station stamped on back).
On condition named in contract.

FIRST CLASS.

Punched.
+

358

One passage.
Worthless if detached.
Punched. Conductors punch here. X X X
+++ W., St. L. & P. St. L., I. M. & S. H. S.

Form X 121.

HOT SPRINGS AND RETURN.

Reverse of Above Principal Ticket.

Agent of Hot Springs railroad will stamp in space below.

Hot Springs, Ark. | Apr. 19, 1882. | Hot Springs R. R.

In compliance with my contract with the Wabash, St. Louis & Pacific railway and lines over which this ticket reads, I hereby subscribe my name as the original purchaser of this ticket.

P. C. BOYLAN.

Witness: JET CONGER,
Agent Hot Springs Railroad.
Dated Hot Springs, Ark., Apr. 19, 1882.

Agent of the Wabash, St. Louis & Pacific railway will stamp in space below.

Chicago City. | Mar. 18, 1882. | W., St. L. & P. R'y.

Reverse of Above Coupon.

NOTE.—Across the face of foregoing ticket are written the following words: Exhibit A. R. G. Davis, notary public.

(All the other coupons originally belonging to the foregoing ticket were used by the plaintiff and received by the various lines of railroad, including defendant, going from Chicago to and returning from Hot Springs, as mentioned in his testimony.)

67 Cross-examination by Mr. KRETZINGER:

Q. This is the ticket you identify as the one that you rode to Chicago on?

A. I think it is.

Q. After you were removed from the train at Lawrence you went back to Hot Springs, and then you identified yourself and signed your name on the ticket, did you not?

A. I did.

Q. That is your handwriting?

A. That is my handwriting.

Q. You wrote that with your right hand, did you not?

A. Yes.

Q. When you presented this ticket and you were put off there was no signature and no signing or identification on the back of this ticket, was there?

A. There was not.

Q. It was your right arm and right hand that you described to the jury as having been injured, was it not?

A. Yes, sir.

The COURT: Was the last coupon on your ticket when you handed — to the conductor?

A. The first time it was.

Q. You say after you left it was handed out to you.

A. It was passed out through the window of the car as the car was moving along.

Q. By a passenger or the conductor?

A. By a passenger, I think.

Q. What did the conductor say when you accused him of having taken this coupon off?

A. He denied having it.

Q. Did he deny having it torn off?

A. He denied having it. I accused him of having the coupon and he denied it.

Mr. KRETZINGER: You didn't charge that he had torn it off, you simply charged him with having it?

68 A. That is what I charged him with, simply having the coupon.

Q. You rode upon that same coupon to Malvern that day?

A. I did.

Plaintiffs counsel offered in evidence the deposition of W. H. Wood, to which defendants counsel objected.

Objection on grounds above stated; ruling reserved and deposition read subject to the objections; which deposition is as follows:

Deposition of Wm. H. Wood, Taken at San Francisco, California, before J. L. King, on March 30th, 1888.

Int. State your name, age, residence, and occupation.

A. William H. Wood; age, 67 years; reside in the city and county of San Francisco, State of California; merchant.

Int. Do you know the parties to this suit; and, if so, how long have you known them?

A. Yes; I know both parties. I know the plaintiff since the 19th day of April, 1882, and know of the defendant merely in a general way as a railroad company; how long I have so known it I don't recollect.

Int. If you know the plaintiff, when and where did you first meet him?

A. I first met him on the railroad cars while I was traveling on defendant's railroad at Hot Springs, in Arkansas, on the 19th day of April, 1882, while traveling to St. Louis, Missouri.

Int. State what occurred, if anything, at that time, and if you were traveling at that time upon railway cars state what controversy arose, if any, between the plaintiff and the agents or employees of such railway; give full particulars.

A. On the 19th day of April, 1882, I was a passenger traveling to St. Louis upon the railway cars on defendant's railroad, and
69 soon after leaving Hot Springs station, and when the train had traveled a mile or thereabouts from Hot Springs station, the conductor on the train came through the car in which I was seated and called for the passengers' tickets. When the conductor saw the plaintiff's ticket he, the conductor, told the plaintiff that his, plaintiff's, ticket was all right, but that before he could travel on it it would be necessary for plaintiff to go back to Hot Springs station and present it to the agent of the railroad company there, and that he, plaintiff, would have to get off at the next station and return to Hot Springs. The plaintiff replied that he had bought a round-trip ticket from Chicago to Hot Springs and return, and supposing it was all right had got on board the cars. The conductor replied to Mr. Boylan, the plaintiff, that he must get off at the first station and return to Hot Springs and present his ticket at the company's office at Hot Springs. Plaintiff answered the conductor by saying that he could not afford to use his time for that. The conductor then went through the car and the plaintiff, who all this time was sitting on the seat opposite to me, showed me his ticket and asked me to be a witness to what had occurred and to the refusal of the conductor to allow him to travel on his ticket. When we arrived at the next station, which was Lawrence, the conductor came into the car and called upon the plaintiff to leave the train. The plaintiff refused to leave the train. The conductor then approached him and took hold of him, plaintiff, to remove him from his seat, saying at the same time to plaintiff that he would eject him from the cars. Not being able to remove plaintiff himself the conductor called two or
70 three of the employees of the railroad to assist him in ejecting the defendant [plaintiff] from the car, which they did after a severe struggle, as the plaintiff was a powerful man and held onto his seat, so that it required considerable force to eject him from the car. I was compelled to remove from my seat during the struggle, as I feared personal injury to myself. The ejection of plaintiff was accomplished by physical force of three men, one of whom was the conductor of the train, the others engaged acting under his instructions.

Int. If you have stated that a controversy occurred between the plaintiff and the railway employees give the names of all the witnesses to such controversy within your knowledge.

A. I do not know the names of any of the persons present except the plaintiff, Patrick C. Boylan. I do not know the conductor's name nor the names of any of the passengers or railroad employees present at the time.

Int. When next did you see plaintiff, if you have seen him since that day?

A. I saw him on the next day, in the afternoon, at St. Louis, at the railway station, when I was about to take the train for Boston. He then informed me that he had to return to Hot Springs and had lost a day, besides his expenses.

Int. Please detail all the conversation you heard between plaintiff and any employees of said train. Give it as fully as you can recall it.

A. The only conversations between plaintiff and employees of the train I heard were such as I have stated, which occurred between plaintiff and the conductor of the train. I have given them as fully as I can recall them.

71 Int. If any employees of said train laid hands on said plaintiff in your presence please state how many employees were present at the time and what, if anything, did they do or say to plaintiff.

A. The conductor and either two or three other employees of the train violently and by force ejected the plaintiff from the train; they together dragged and pushed him off. I did not hear any of the other employees than the conductor speak to plaintiff during the time occupied in putting plaintiff off the train. I left my seat in the car to be out of the way. I have already stated all that I heard the conductor say to the plaintiff.

Int. If any force was used by such employees against plaintiff please state in what manner the plaintiff had conducted himself before such force was used.

A. Plaintiff, during all the time he was on board the train, conducted himself in a quiet and peaceable manner.

Int. State any other matter or thing of advantage to the plaintiff in this regard.

A. I know of nothing further, except that I omitted to state that when plaintiff showed me his ticket after the conductor had told him he must get off at the next station he, plaintiff, when he asked me to be a witness to what occurred, said "I have a right to stay here."

X Int. If you state, in answer to the direct interrogatories, that you was present on the cars of the defendant at a time when any controversy arose between the plaintiff and any of the employees of the defendant, give the date of such controversy, and how far the same occurred from Hot Springs.

72 A. The controversy occurred on the 19th day of April, 1882, and commenced when we were a mile or thereabouts

from Hot Springs, in the direction of Lawrence, at which latter place plaintiff was ejected from the train.

X Int. What is the distance from Hot Springs to Malvern?

A. Twenty-three miles, I think.

X Int. Do you know the amount of fare for one passage from Hot Springs to Malvern, over the road of the defendant?

A. I do not now recollect.

X Int. In this conversation to which you allude who was the agent or employee of the defendant company that took part in the same?

A. The conductor in charge of the defendant car in which we were then travelling.

X Int. How do you know he was a conductor of the defendant?

A. Because he acted as conductor of the train, took up, examined, and punched the tickets of the passengers on the car in which I was in. I learned after plaintiff was put off the train that he was a conductor of defendant from some of the passengers on board who lived at Hot Springs and who knew him. They also informed me that he, the conductor, would have been discharged from the employ of the company had he not put the plaintiff off the train.

X Int. Why did the conductor refuse to accept the ticket presented by the plaintiff?

A. On the ground that it had not been presented at the company's office in Hot Springs before the plaintiff took the train.

X Int. What reason did plaintiff then assign for not appearing at the office of the defendant at Hot Springs, identifying himself before the agent there, resigning the ticket, and having the
73 same stamped by such agent?

A. I do not recollect that he assigned any reason.

X Int. Did you get off the train with the plaintiff?

A. No; I did not.

X Int. How much fare did the agent or conductor of the defendant require to be paid so as to permit the plaintiff to ride to Malvern, or the end of defendant's road?

A. The conductor made no demand for fare from the plaintiff.

X Int. Did the plaintiff refuse to pay this amount of fare?

A. None was demanded, to my recollection.

X Int. Upon the plaintiff refusing to pay the fare after the conductor had refused to accept the ticket did not the conductor ask the plaintiff to leave the car and didn't the plaintiff refuse to do so?

A. Nothing was said about fare. The conductor said to plaintiff that he, plaintiff, would have to go back to Hot Springs and present his ticket to the agent there before he could travel on it, and upon the plaintiff refusing to leave the train at the first station we arrived at he was put off the train by force.

X Int. If you state that you got off with the plaintiff and went back with him to Hot Springs you may state if it is not true that the plaintiff went to the agent of defendant at Hot Springs, identified himself, and had the ticket duly stamped according to the conditions printed on the ticket; and after the same was done did not the

plaintiff get on the cars of the defendant and ride upon such ticket to Malvern?

A. I did not get off the cars with plaintiff, nor did I return with him to Hot Springs.

WM. H. WOOD.

74 The plaintiff was recalled to the stand and further examined by Mr. BONNEY, as follows:

Q. State to the jury what your earnings in the business in which you were engaged were during the year preceding your expulsion from the train.

The COURT: You had better state what that business was.

Mr. BONNEY: Dealings in mining stock, as you stated.

WITNESS: I was also dealing in wheat, oats, and corn.

The COURT: Dealing in grains and provisions and mining stock for a year before?

A. Yes; on the Board of Trade and Stock Exchange.

Q. Where—in San Francisco or here?

A. Here in Chicago and in San Francisco.

Mr. BONNEY: Now, I ask you to state to the jury what your earnings in that business were during the year preceding your expulsion from the train.

Objected to upon the specific grounds heretofore stated, and upon the additional ground that the answer to the question would not furnish any rule or measure for damages for which the defendant company was liable, even for a wrongful expulsion, and plaintiff has not shown that he presented to the conductor such a ticket as entitled him, according to the conditions plainly appearing upon the face of the ticket, to ride thereon, and therefore the conductor was justified in expelling him.

Objection sustained, and plaintiff's counsel thereupon excepted.

The foregoing was all the evidence offered in the case.

Defendant's counsel thereupon moved to strike out all evidence offered by or on behalf of the plaintiff touching the force used in removing plaintiff from the train, and also all evidence concerning the expulsion of the plaintiff from the train, upon the grounds, first, that this is an action of assumpsit for breach of contract, and therefore no recovery can be had for personal injury; second, the plaintiff fails to show that he presented a ticket or voucher
75 to the conductor which entitled him to ride; third, the evidence shows that the plaintiff had an opportunity to pay fare, but peremptorily refused to do so; therefore his expulsion was justifiable; fourth, the evidence shows that the plaintiff refused to pay any fare, and insisted upon his right to ride upon this unexecuted ticket, and refused to leave the car voluntarily upon the request made to him so to do by the conductor; therefore the plaintiff justified the defendant's agents in using force sufficient to eject him, and excessive force is not averred in the declaration or attempted to be

shown; fifth, where the plaintiff makes it necessary to use force to eject him, under such circumstances the law will not permit him to recover damages therefor; sixth, it appears that plaintiff returned from Lawrence to Hot Springs, identified himself, signed his name and had the ticket stamped by the agent, and immediately thereafter entered the train of the defendant and presented this ticket and rode thereon to Malvern, and from thence to Chicago, and thus the contract for the return trip was performed on the part of the defendant, and therefore the plaintiff is not entitled to recover in this action for breach of contract; seventh, the act of the plaintiff in returning to Hot Springs and identifying himself and having his ticket signed and stamped, and signing the same himself and riding thereon to Chicago constituted a waiver of any estoppel if such estoppel otherwise might have arisen against the defendant by reason of the baggage-master checking the baggage; eighth, plaintiff was plainly informed by one of the conditions appearing upon the face of the ticket that no agent or employee of the defendant company had the right or authority to waive the performance of any of the conditions agreed to be performed by the plaintiff,
76 and therefore no statements or acts of the baggageman or gate-keeper could become or constitute a waiver or an estoppel against the defendant company; ninth, that until the plaintiff identified himself at the Hot Springs office and the agent signed the ticket and had the same stamped and signed by the agent he had no subsisting contract between himself and the defendant for a return passage to Chicago.

The court, after hearing the argument of counsel, sustained said motion; to which plaintiff's attorney then and there excepted; and thereupon the court instructed the jury to return a verdict for the defendant; whereupon the plaintiff, by his counsel, then and there excepted; and thereupon the jury returned a verdict for the defendant in words and figures following, to wit:

We, the jury, find the issues for the defendant.

Whereto the plaintiff, by his counsel, then and there excepted.

And thereupon the plaintiff moved the court to set aside the verdict and award a new trial of this case for the following, among other reasons—that is to say:

1. The condition of the ticket, for non-compliance wherewith the plaintiff was expelled from the train, was unreasonable and void.

2. Said condition of said ticket was substantially complied with by the acceptance of the ticket by the baggage-master and his checking the plaintiff's baggage thereon and punching the same. The baggage-master's punch now appears on the ticket.

3. Said condition was also substantially complied with by its acceptance by the gateman and his passing the plaintiff
77 through the gate to the train.

4. By the action of the baggage-master and the gateman in checking the plaintiff's baggage and passing him through to the train the defendant was estopped to set up the condition that the ticket should be signed and stamped at Hot Springs.

5. The condition of the ticket that no agent of the company could

waive any condition of the ticket is void as against public policy, and the condition was waived by the action of the company through its baggage-master and gateman.

6. Said condition of the ticket was not binding on the passenger, because it was not particularly explained to and knowingly agreed to by him.

7. Said ticket, as presented to the conductor, was a receipt in writing showing actual payment by the passenger for the return trip, and clearly entitled the plaintiff to make the same.

8. Defendant had no right to expel plaintiff from its train, while it retained the money paid for the return trip, so long as plaintiff was not guilty of any gross misconduct.

9. The expulsion was unlawful, because the conductor did not ask plaintiff to show his identity or give him any opportunity so to do.

10. The expulsion was also unlawful because no specific amount of fare was demanded from plaintiff as a condition of continuing the journey.

11. As the plaintiff was acting, under claim and color of right, in good faith, his violent expulsion was contrary to law and public policy, and any conditions of the ticket to the contrary are unreasonable, vexatious, and void.

78 12. The contract of the defendant as a common carrier was to carry the plaintiff safely from Hot Springs to the other terminus of its road, and his forcible expulsion and the injuries inflicted upon him were a direct breach of that contract, and all the injuries suffered therefrom are direct consequences of the violation of the contract.

13. The injury to the plaintiff's health was a direct consequence of his expulsion, as is shown by the evidence, and he is entitled to full compensation therefor.

14. The plaintiff is also entitled to recover full compensation for all the probable profits of his business which were lost in consequence of his maltreatment by the defendant.

15. The jury should fix the amount of such compensation from the evidence, aided by their own knowledge and experience, as far as applicable thereto.

16. The expulsion of the plaintiff from defendant's train was for non-compliance with a mere form, and it is not shown that such non-compliance involved any substantial injury, nor even any serious inconvenience, to the defendant, and the expulsion was, therefore, wholly unlawful.

17. The carrier was bound to transport passengers for a reasonable fare and without any vexatious, annoying, or inconvenient restrictions. If the sum paid by the plaintiff for the ticket in

79 question was not a reasonable compensation it was an unjust discrimination against the general traveling public, and if it was a reasonable rate of fare with the conditions imposed it was such reasonable rate without regard to those conditions. There is no relation between the conditions and the reasonableness of the rate of fare.

18. The testimony offered in behalf of the plaintiff and excluded

by the court, on motion of the defendant, is competent and admissibe and would have shown plaintiff's right to recover.

19. Said verdict and the instruction of the court under which the same was given are otherwise manifestly contrary to law and the rights of the plaintiff.

But the court, on the consideration of said motion, overruled the same and gave judgment on said verdict.

Whereto the plaintiff, by his counsel, then and there excepted and prayed the court to sign and seal this bill of exceptions, which is accordingly done.

WALTER Q. GRESHAM. [SEAL.]

80 *Stipulation to Submit to the Supreme Court under the Twentieth Rule Thereof.*

The plaintiff in this cause having determined to remove the same to the Supreme Court of the United States, the parties have agreed to submit the same to that court under the twentieth rule thereof. The defendant will join in error without the issue and service of process. The transcript shall be obtained, the necessary parts thereof printed, and the briefs and arguments be prepared pursuant to the rule in time for a submission of the same to the Supreme Court at the commencement of the October term thereof, A. D. 1889.

G. W. KRETZINGER, *Att'y for Defendant.*
C. C. BONNEY & LYMAN M. PAINE,
Attorneys for Plaintiff.

Dec. 17, 1888.

Endorsed: Filed Dec. 17, 1888. Wm. H. Bradley, clerk.

81 Afterwards, to wit, on the nineteenth day of March, 1889, there was filed in said clerk's office a bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, Patrick C. Boylan, as principal, and Lyman M. Paine, as surety, are held and firmly bound unto the Hot Springs Railroad Company in the full and just sum of fifty dollars, to be paid to the said Hot Springs Railroad Company, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a term of the circuit court of the United States, held at the city of Chicago, in the northern district of Illinois, in a suit depending in said court between said Patrick C. Boylan as plaintiff and said Hot Springs Railroad Company as defendant, a judgment was rendered against the said plaintiff for costs on a ver-

dict in favor of said defendant, and the said plaintiff, Patrick C. Boylan, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judg-
82 ment in the aforesaid suit, and a citation directed to the said Hot Springs Railroad Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said Patrick C. Boylan shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

PATRICK C. BOYLAN. [SEAL.]
LYMAN M. PAINE. [SEAL.]

The above security is satisfactory.

G. W. KRETZINGER,
Attorney for said Defendant.

Approved by—
W. Q. GRESHAM,
Circuit Judge.

(Endorsed:) Filed M'ch 19, 1889. Wm. H. Bradley, clerk.

83 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein Patrick C. Boylan is plaintiff and The Hot Springs Railroad Company is defendant, as the same appear from the records and files of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, northern division, this thirtieth day of March, 1889.

WM. H. BRADLEY, *Clerk.*

84 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you, in said circuit court, between Patrick C. Boylan, plaintiff in error, and Hot Springs Railroad Company, defendant in error, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Patrick C. Boylan, plaintiff in error, as by his complaint appears, and it being

fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1889, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eleventh day of March, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the 113th year.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

[Endorsed:] Supreme Court of the United States. Patrick C. Boylan, plaintiff in error, *vs.* Hot Springs R. R. Co., defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S., northern district of Illinois.

85 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

To The Hot Springs Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1889, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Patrick C. Boylan is plaintiff and you, the said Hot Springs Railroad Company, are defendant, to show cause, if any there be, why the judgment rendered in the action in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Walter Q. Gresham, judge of the circuit court for the seventh circuit, this 16th day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

WALTER Q. GRESHAM.

Service accepted this March 18, 1889.

G. W. KRETZINGER,
Att'y for Def't in Error.

[Endorsed:] Supreme Court of the United States. Patrick C. Boylan, plaintiff in error, *vs.* Hot Springs R. R. Co., defendant in error. Citation to October term, A. D. 1889.

86 In the Supreme Court of the United States, to the October Term, A. D. 1889.

PATRICK C. BOYLAN, Plaintiff in Error,
vs.
THE HOT SPRINGS RAILROAD COMPANY, Defendant in Error.
} Error to the Northern District of Illinois.

Assignment of Errors.

And now comes the said Patrick C. Boylan, plaintiff in error, by Charles C. Bonney, his attorney and counsel, and says that in the foregoing proceedings and final judgment of the circuit court of the United States for the northern district of Illinois in this cause there is manifest error, in this, to wit:

First. Said circuit court erred in excluding from the jury proper evidence offered by said plaintiff on the trial of this cause. See specification annexed hereto.

Second. Said circuit court also erred in instructing the jury to return a verdict for said defendant.

Third. Said circuit court also erred in holding upon the trial below, in effect, that the condition of the railroad ticket in question, requiring it to be re-signed and restamped before the return journey therewith, and for a neglect whereof the plaintiff was expelled from defendant's train, was not against public policy nor unreasonable, vexatious, and void as a condition of the common right to be carried.

87 Fourth. Said circuit court also erred in holding upon the trial, in effect, that said condition was not substantially complied with when the defendant's baggage-master treated said ticket as sufficient and checked plaintiff's baggage upon it and punched it in the usual manner, nor when the gateman of defendant also treated said ticket as sufficient, and passed the plaintiff through the gate to the train.

Fifth. Said circuit court also erred in holding upon the trial, in effect, that the defendant was not estopped to set up said condition by the aforesaid acts of the baggage-master and gateman, nor by the act of carrying the plaintiff away from the place specified for re-signing and restamping said ticket according to said condition.

Sixth. Said circuit court also erred in holding upon the the trial, in effect, that the provision of said ticket that no agent of the company could waive any condition thereof was not void as against public policy.

Seventh. Said circuit court also erred in holding upon the trial, in effect, that defendant had a right to expel plaintiff from its railroad train while he held and exhibited to the conductor a receipt in writing for the fare for the journey that he was not allowed to make.

Eighth. Said circuit court also erred in holding upon the trial, in effect, that defendant had a right to expel plaintiff from its train

for a mere non-compliance with said condition without returning to him the money paid for the journey in question.

88 Ninth. Said circuit court also erred in holding upon the trial, in effect, that the expulsion of plaintiff was not unlawful, although no specific sum of fare was demanded from plaintiff as a condition of continuing his journey.

Tenth. Said circuit court also erred in holding upon the trial, in effect, that although plaintiff was in defendant's car under claim and color of right, in good faith, nevertheless defendant had a right to expel him forcibly for non-compliance with a mere regulation of no practical importance.

Eleventh. Said circuit court also erred in holding upon the trial, in effect, that the plaintiff was not entitled to recover compensation for all or any of the injuries suffered from his expulsion, in his mind, body, or business, as proper damages for the breach of contract of carriage.

Twelfth. Said circuit court also erred in holding upon the trial, in effect, that the expulsion of said plaintiff by said defendant from its railroad train was lawful without showing any authority for such expulsion by any statute, charter, by-law, or contract whatsoever.

Thirteenth. Said circuit court also erred in holding upon said trial, in effect, that said defendant had the right to deprive said plaintiff of his property in the carriage in question without due process of law, and also in holding that in the controversy which arose between the parties said defendant had the right to take the law into his own hands, and be at the same time accuser, judge, and executioner.

Fourteenth. Said circuit court also otherwise manifestly erred in the conduct of said trial and in holding, in effect, that the plaintiff had not the right to submit to the jury his claim to

89 recover from the defendant, under all the circumstances of the case, the damages suffered from his expulsion.

Wherefore the said plaintiff in error prays that the said Supreme Court of the United States will proceed and consider as well the record of the proceedings and judgment aforesaid as the matters aforesaid above specifically assigned for error, and that the judgment aforesaid may for the respective errors aforesaid be annulled, reversed, and altogether made as nothing; and that the said circuit court may be directed to proceed and do justice to said plaintiff in all the matters aforesaid, and that he may be restored to all and whatsoever he hath lost by reason of said errors and judgment, and that he may have and recover his costs by him in this behalf most wrongfully sustained, &c.

CHARLES C. BONNEY,
Attorney and Counsel for Plaintiff in Error.

Chicago, April 8, 1889.

90 *"Specification of the Full Substance of the Evidence Rejected and Excluded."*

I.

1. Upon the trial the court refused to allow plaintiff to testify when he first actually knew of the requirement to have his ticket restamped at Hot Springs.

2. Also to allow plaintiff to testify whether his disability to pursue his business was caused by any other matter or thing than his expulsion from defendant's car.

3. Also to allow plaintiff to testify what would have been the probable profits from the business on which he went to California if he had been able in health to carry same into effect.

4. Also to allow plaintiff to testify what amount of money he was earning per year in his business when the expulsion took place.

5. Also to allow plaintiff to testify, from his best judgment, the amount of his annual loss of earnings in consequence of his expulsion.

6. Also to allow plaintiff to testify what injury resulted from his expulsion to his business and means of livelihood.

7. Also to allow plaintiff to testify what special damage resulted to him from his expulsion.

8. Also to allow plaintiff to testify what his earnings were in his business of dealing in stocks and grain during the year preceding his expulsion.

II.

And upon the conclusion of plaintiff's case the court, on motion of defendant, excluded from the jury all the evidence offered by the plaintiff touching the following points:

91 1. All evidence touching the force used in removing plaintiff from the train in violation, as he claimed, of the contract to carry him safely.

2. All evidence concerning the expulsion of plaintiff from the train in violation, as he claims, of the contract of carriage.

The evidence clearly showed that the expulsion was solely upon the ground that plaintiff had neglected to have his ticket restamped for the return journey, and that notwithstanding that neglect the baggage-master had checked his baggage and punched the ticket, and that the gateman had inspected it and admitted him to the train, and that the railroad company had carried plaintiff away from the place where the restamping was required to be procured. The evidence plainly presents the questions of waiver, estoppel, and excessive force.

References to Declaration to Show Relevancy of Evidence.

III.

The declaration sets up, among other things—

1. Payment for the so-called "round trip."

2. Plaintiff's failure to notice or remember the requirement to have the ticket restamped before the return journey.

3. The acceptance of the ticket by the baggage-master and the gateman, and that plaintiff's baggage was actually taken from him and sent to Chicago, where he received it.

4. That defendant carried plaintiff away from the place appointed for restamping the ticket.

5. That plaintiff was always ready to identify himself whenever requested, but no such request was made.

6. That plaintiff was not permitted to continue the journey, but was expelled from the train with great violence, in breach of the contract of carriage, and was violently beaten, bruised,
92 wrenched, stamped upon, maltreated, and injured.

7. Special damage is specially set forth in the loss of profits and earnings in the business of dealing in mines and mining stocks, in which plaintiff had been successfully engaged for many years.

8. The declaration also avers that all the damages specified were the direct result of the breach of the contract of carriage.

9. Also that the requirement that the ticket should be signed, dated, and stamped at Hot Springs was wholly unreasonable, unlawful, and void, and formed no valid part of the contract of carriage on which the suit was brought.

The testimony of plaintiff and of the witness, William H. Wood, tended to support the case made in the declaration.

93 *Joinder in Error.*

And hereupon comes the said defendant in error, by George W. Kretsinger, its attorney, and says that there is no error, either in the proceedings aforesaid or in the judgment aforesaid. Wherefore it prays that said judgment may be in all things upheld and affirmed, and that it may recover its further costs on said writ of error, to be adjudged to it by the said Supreme Court, etc.

G. W. KRETZINGER,
Attorney and Counsel for Defendant in Error.

Chicago, April 8th, 1889.

Endorsed on cover: N. Illinois C. C. U. S. No. 1140. Patrick C. Boylan, plaintiff in error, *vs.* The Hot Springs Railroad Company. Filed April 29, 1889.

Office Supreme Court U. S.
FILED.
JUL 11 1889
JAMES H. McKENNEY,
CLERK.

No. 1140.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1889.

PATRICK C. BOYLAN,
Plaintiff in error,
vs.
THE HOT SPRINGS RAILROAD COMPANY,
Defendant in error.

Error to the Circuit Court for the Northern District of Illinois.

Submitted under Twentieth Rule.

OPENING BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

BY CHARLES CARROLL BONNEY,
Solicitor and Counsel for Plaintiff.

CHICAGO
PRINTED BY THE CHICAGO LEGAL NEWS COMPANY 87 CLARK STREET
1889.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1889.

PATRICK C. BOYLAN,
Plaintiff in error,
vs.
THE HOT SPRINGS RAILROAD COMPANY,
Defendant in error.

Error to the Circuit Court for the Northern District of Illinois.

Submitted under Twentieth Rule.

OPENING BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

BY CHARLES CARROLL BONNEY,
Solicitor and Counsel for Plaintiff.

CHICAGO
PRINTED BY THE CHICAGO LEGAL NEWS COMPANY 87 CLARK STREET
1889.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1889.

PATRICK C. BOYLAN,
Plaintiff in error.
vs.
THE HOT SPRINGS RAILROAD COMPANY,
Defendant in error.

Error to the Circuit Court for the Northern District of Illinois.

Submitted under Twentieth Rule.

MR. BONNEY'S OPENING BRIEF AND ARGUMENT FOR PLAINTIFF.

I.

STATEMENT OF THE CASE.

This was an action of assumpsit, on a contract of carriage, laying damages at forty thousand dollars. Defendant was engaged in business in Illinois, and, by agent, sold to plaintiff a so-called special tourist ticket for the so-called round trip from Chicago to Hot Springs, Arkansas, and return, and received $41.50 therefor. (Printed Record, p. 4.)

The ticket purported to be a special contract executed between the parties. It contained five special provisions, and no less than twelve specific conditions to be observed by the passenger. The degree of intellectual ability and personal care required to

understand and comply with all those provisions and conditions, will hereafter appear. The ticket was also sometimes designated by the well-merited name of "the iron-clad." The so-called special contract provided that the ticket should entitle the purchaser to the outgoing and to the return passage, if officially stamped on the back, and presented with the coupons annexed, and it was so stamped, and in due course so presented. But one of the annexed special conditions provided that the ticket should not be good for the return trip, unless further officially dated, signed and stamped at Hot Springs, within a specified time. Six coupons were annexed for the several divisions of the journey, one of which was for the journey from Malvern to Hot Springs, and the next one of which was for the return from Hot Springs to Malvern, the termini of defendant's road. (Copy of ticket in Printed Record, p. 31.)

Plaintiff made the outgoing journey without trouble, and when he was ready to return, not knowing or remembering that the ticket required re-signing, re-dating and re-stamping, he went to the baggage-master of defendant at Hot Springs, showed him the ticket and requested a check to Chicago for his baggage. The baggage-master took the ticket, punched it, and delivered the desired check, without objection or calling plaintiff's attention to the omission of any re-authentication of the ticket. Plaintiff then went to the gate of entrance to the return train, and showed his ticket to the gateman, who looked at it and passed plaintiff through the gate to the train without any objection. Plaintiff took his seat in the proper car, and the train started on the return journey to Chicago. (Record, p. 26.)

After the train had left Hot Springs, the conductor came to plaintiff and called for his ticket, which was promptly presented. The conductor rejected it, saying it was not good because not stamped at Hot Springs. Plaintiff replied that the baggageman said nothing about that when he checked the baggage, and plaintiff did not know it was necessary. The conductor said plaintiff would have to get off, go back to Hot Springs and have the ticket stamped there. Plaintiff objected, and asked if there was not some way to fix the matter. The conductor said he must go back or pay full fare. Plaintiff refused to leave the train; a controversy arose; the passions of the parties became excited; the conductor called two men to his assistance; they seized plaintiff to remove him; he resisted, and they expelled him from the car with much violence. Some blood was shed by stamping on plaintiff's hand, and plaintiff was badly bruised.

The expulsion occurred at Lawrence, Ark. Plaintiff waited for the next train back to Hot Springs; paid his fare and returned there; signed his ticket and had it stamped, and took the next train for Chicago. At Malvern he felt compelled to stop and go to bed for four or five hours, and in St. Louis he had to lie over more than twelve hours before he felt able to go on to Chicago.

The ticket provided that the passenger should identify himself by signing his name and otherwise, whenever called upon by the conductor or agent to do so, but the conductor did not ask for any such identification. Nor did he demand any specific sum of fare, as a condition of permitting plaintiff to continue the journey. Practically, plaintiff's contention was that while the failure to have his ticket

stamped before the return journey would have authorized the baggage-master to refuse to check his baggage, and the gateman to refuse to admit him till the condition had been complied with, nevertheless there was nothing in the contract or in the law authorizing his expulsion for that cause, after the defendant had voluntarily carried him away from the only place where the condition could be performed.

The ticket showed actual payment of the return fare, and there was no offer to return it before the expulsion.

Prior to his expulsion plaintiff had been a strong, vigorous and healthy man, and had for many years been engaged, principally in California, in speculating in mining stocks and other property. Before his return from Hot Springs, he had planned to return to California on that business, and did so, but was so badly broken down in health that he could not continue it. He has since been unable to pursue it, or any other active business, and claims that he has suffered large losses in his business, earnings and profits, as well as serious bodily injuries from his expulsion from the railroad car, in violation of the contract to carry him SAFELY AND WITH CARE on the return journey for which he paid. The testimony is brief, and the court is asked to read it in connection with this statement. (Printed Record, p. 24.) The plaintiff's testimony was corroborated by the deposition of William H. Wood. (P. Record, p. 33.)

Plaintiff brought suit for the damages to his health and to his business. Special pleas were filed, to which demurrers were sustained, and the case was tried on the general issue. The court permit-

ted the plaintiff to tell the story of his journey and expulsion to the jury, but refused to let him state the resulting injury to his business, and ability to earn money; and at the conclusion of plaintiff's evidence, the court, on motion of defendant, excluded all the evidence relating to the force used in removing plaintiff from the train; also all that relating to his expulsion, and directed the jury to return a verdict for the defendant, which was accordingly done. Exceptions to the rulings of the court upon the trial were duly saved and certified. The controversy upon the trial was almost wholly over the conflicting propositions of law, for which the respective parties contended. Those on which the plaintiff relied are collected, as a matter of convenience, in connection with his motion for a new trial (P. Record, p. 38); and those made in behalf of defendant are likewise brought together in support of its motion to exclude the evidence, and direct a verdict in its favor. (P. Record, p. 37.)

Among the questions presented by this case for decision, are the following:

1. Whether any authority of law or of contract for the forcible expulsion of the plaintiff was shown upon the trial?

2. Whether the regulations prescribed by the carrier, and stated on the ticket, include any such authority, and if so, whether it extends to the particular case stated in the declaration and set forth in the evidence?

3. Whether the condition of the ticket, for a disregard of which the plaintiff was expelled from the train, was lawful and proper, or against public policy and void?

4. Whether the jury should have been permitted

to find from the evidence, whether the regulation and expulsion were, under the existing circumstances, reasonable and therefore justifiable, or were unreasonable, and therefore contrary to law?

5. Whether the jury should have been permitted to find whether the carrier had waived, or was estopped to set up and insist upon the condition in question?

6. Whether damages, by reason of injury to the business, as well as to the person of the passenger, may properly be recovered in assumpsit for a breach of the contract to carry safely, and diligently protect from harm?

7. What are the limitations, restrictions and conditions of the carrier's supposed right of forcible expulsion? Is it a proper and justifiable remedy for any disregard of any regulation, however trifling? or is it allowable only for gross misconduct, or for an attempt to steal a ride?

These questions sufficiently indicate the nature of the present controversy, and lead to others which are set forth in the assignments of error, and in the following brief of the argument.

II.

The Errors Assigned.

The first two errors assigned are general and comprehensive. Those which follow are intended to specify the matters of law necessarily held by the court upon the trial, as the conditions precedent to the exclusion of plaintiff's evidence, and to the direction to the jury to find a verdict for the defendant.

ERRORS.

1. Excluding proper evidence for plaintiff. See Specifications annexed. (Record, p. 45.)

2. Directing the jury to find a verdict for defendant.

3. Holding the condition of the ticket, for neglect whereof plaintiff was expelled, not against public policy, nor unreasonable, vexatious and void, as a condition of the common right of travel.

4. Holding the condition not satisfied by the checking of plaintiff's baggage, the punching of the ticket in the common form, and by the action of the gateman in treating the ticket as sufficient and admitting plaintiff to the train.

5. Holding that defendant was not estopped by the acts of the baggage-master and the gateman nor by carrying plaintiff away from the place for the execution of the condition, from setting it up as a justification of the expulsion.

6. Holding that the provision that no agent could waive any condition of the ticket was not void as against public policy.

7. Holding that defendant had a right to expel plaintiff, notwithstanding the fact that he exhibited to the conductor a ticket that amounted to a receipt in writing for the fare for the journey he was prevented from making.

8. Holding that defendant had a right to expel plaintiff for non-compliance with an unimportant condition, without returning the money received for the return journey.

9. Holding the expulsion of plaintiff lawful, although no specific sum of fare was demanded as a condition of continuing the journey.

10. Holding that the expulsion of plaintiff was

lawful, for non-compliance with a regulation of no practical importance, although it was clear that plaintiff was acting in good faith, and under claim and color of good title.

11. Holding that plaintiff was not entitled to recover for the injuries to his mind, body and business, resulting from the flagrant violation by defendant of its contract of carriage.

12. Holding that defendant had the right of expulsion without showing any warrant for it, either in the contract of carriage, or by any statute, charter or by-law whatsoever.

13. Holding that defendant had the right to deprive plaintiff of a journey for which he had confessedly paid, without due process of law, but by constituting its conductor sole prosecutor, judge and executioner in the case.

14. General assignment in common form.

SPECIFICATION OF THE FULL SUBSTANCE OF THE EVIDENCE REJECTED AND EXCLUDED.

I.

1. Upon the trial, the court refused to allow plaintiff to testify when he first actually knew of the requirement to have his ticket re-stamped at Hot Springs.

2. Also to allow plaintiff to testify whether his disability to pursue his business was caused by any other matter or thing than his expulsion from defendant's car.

3. Also to allow plaintiff to testify what would have been the probable profits from the business on which he went to California, if he had been able in health to carry same into effect.

4. Also to allow plaintiff to testify what amount

of money he was earning per year in his business when the expulsion took place.

5. Also to allow plaintiff to testify, from his best judgment, the amount of his annual loss of earnings, in consequence of his expulsion.

6. Also to allow plaintiff to testify what injury resulted from his expulsion, to his business and means of livelihood.

7. Also to allow plaintiff to testify what special damage resulted to him from his expulsion.

8. Also to allow plaintiff to testify what his earnings were in his business of dealing in stocks and grain, during the year preceding his expulsion.

(Printed Record, pp. 24-30, 37.)

II.

And upon the conclusion of plaintiff's case, the court, on motion of defendant excluded from the jury all the evidence offered by the plaintiff, touching the following points:

1. All evidence touching *the force used* in removing plaintiff from the train, in violation, as he claimed, of the contract to carry him *safely*.

2. All evidence concerning *the expulsion* of plaintiff from the train, in violation, as he claimed, of the contract of carriage. (Pr. Rec. 37-8.)

The evidence clearly showed that the expulsion was solely upon the ground that plaintiff had neglected to have his ticket re-stamped for the return journey; and that notwithstanding that neglect, the baggage-master had checked his baggage and punched the ticket; and that the gateman had inspected it, and admitted him to the train; and that the railroad company had carried plaintiff away from the place where the re-stamping was required to be procured.

The evidence plainly presents the questions of waiver, estoppel and excessive force. (Printed Record, pp. 26–7, 34–5.)

III.

References to the Declaration to Show Relevancy of Evidence.

The declaration sets up, among other things:

1. Payment for the so-called "round trip."
2. Plaintiff's failure to notice or remember the requirement to have the ticket re-stamped before the return journey.
3. The acceptance of the ticket by the baggage-master and the gateman, and that plaintiff's baggage was actually taken from him and sent to Chicago, where he received it.
4. That defendant carried plaintiff away from the place appointed for re-stamping the ticket.
5. That plaintiff was always ready to identify himself, whenever requested, but no such request was made.
6. That plaintiff was not permitted to continue the journey, but was expelled from the train with great violence, in breach of the contract of carriage, and was violently beaten, bruised, wrenched, stamped upon, maltreated and injured *in violation of that contract.*
7. Special damage is specially set forth in the loss of profits and earnings in the business of dealing in mines and mining stocks, in which plaintiff had been successfully engaged for many years.
8. The declaration also avers that all the damages specified, were the direct result of the breach of the contract of carriage.

9. Also, that the requirement that the ticket should be signed, dated and stamped at Hot Springs, was wholly unreasonable, unlawful and void, and formed no valid part of the contract of carriage on which the suit was brought.

The testimony of plaintiff, and of the witness William H. Wood, tended to support the case made in the declaration.

JOINDER.

Defendant joins in error, and affirms that there is no error, either in the proceedings or the judgment in the case.

III.

BRIEF OF THE ARGUMENT.

1. The familiar maxim, *salus populi est suprema lex*, may well lead the way to a consideration of this case. The right of transportation by any common carrier, is a common right of all the people, and public policy commands that it be kept free from all unreasonable, vexatious or oppressive conditions, regulations or restrictions. If the conduct of the carrier in this case would be lawful, just and proper, if applied to the traveling public generally, then it was right toward the plaintiff, for he can claim no special exemption, which others, similarly situated, may not invoke. And, on the other hand, if the conduct of the defendant would be deemed outrageous, if applied under like circumstances to the common people, as seen in the ordinary railway car, then it must be held unlawful against him, and that the carrier should respond in damages for the injuries inflicted by its agents and servants.

2. It is admitted that a common carrier may make REASONABLE regulations. Angell on Carriers, Sec. 530, *et seq*. But if any rule or regulation made by a common carrier be an unnecessary infringement of the rights and liberty of the passengers, it is *unlawful* because *unreasonable*. "The distinction between such regulations as are necessary, and conducive to the comfort and convenience of travelers, or to protect the rights of the company, must, from its very nature, be a question of fact, rather than of law; and the reasonableness or unreasonableness of the regulation is properly for the consideration, not of the court, but of the jury."

State v. *Overton*, 4 Zabriskie, 435.

The reasonableness of a corporate *by-law* is said to be a question for the court instead of the jury. *Ibid.* Even an ordinance of a municipal corporation will be held void if unreasonable, oppressive, or against common right.

1 Dillon on Municipal Corporations, Secs. 319 to 325, and cases cited.

Much more will a mere rule or regulation of a common carrier be held void, which unreasonably, oppressively or vexatiously interferes with the common right of the people to be carried, on the simple conditions of payment of reasonable fare, and good behavior.

3. But the doctrine of *reasonableness*, must apply, not only to the regulation itself, but also and fully to its interpretation and application. If reasonable for one purpose, and oppressive for another, it may be upheld for the former, and held void as to the other. Even the most praise-worthy regulation should only be sustained to a reasonable extent, and in a reasonable manner, and under reasonable circumstances. The carrier will not be allowed to deprive a passenger of a journey for which he has paid, if the passenger be not guilty of any gross misconduct. As between the carrier and the public, as represented in the person of the individual passenger, all doubtful questions should be resolved in favor of the public. As the superior physical power in the case is on the side of the carrier, the courts of justice will take great care to protect the people against any serious intringement of the right of travel, by force, fraud, or oppressive and unreasonable regulations or conduct; and to that end the courts will construe with great strictness every de-

parture of the carrier from the established usage, or the settled course of the common law.

The conductor must be charged with a full knowledge of the usages of travel on his road. He therefore knew that the defendant company had disregarded the condition of re-stamping, in checking plaintiff's baggage, because it plainly showed the baggage punch "B," on its face. He also knew that the company had also disregarded that condition, by accepting the ticket at the gate as sufficient, and admitting the plaintiff, on it, to the train. Having thus twice disregarded the requirement, and having taken plaintiff away from the place of performance, and knowing from the ticket that he had paid for the return journey, the defendant was guilty, not only of unreasonable conduct, but of an outrageous breach of the essential provisions of the contract of carriage, in expelling plaintiff from the train.

The conductor was not asked to act upon any "statement" of the passenger, nor to investigate and decide any question of fact. He knew that the return fare had been paid, and he also knew that two other agents of the company had accepted the ticket.

No material injury could have resulted to the carrier from a non-compliance with the condition in question. And the idea that a forcible expulsion from the car is a just, reasonable and lawful penalty for such an omission on the part of a passenger, should not be tolerated for a moment. Expulsion by force is not a lawful remedy for a mere neglect or violation of a contract. Nor is retaliation or subjugation by force a proper and lawful remedy for fraud or trespass, in an ordinary case. The courts are constituted and sit to administer appropriate

remedies in all such cases. Then when may force be used? Only under special and unusual circumstances, when the use of the force would be likely to prevent a greater wrong or injury. An unlawful intruder may be expelled. A person endeavoring to steal a railway ride may be removed from the train, but, even in such a case, the expulsion must be made at a proper place and in a proper manner. The rule is, that no man should attempt to take the law into his own hands, and be at the same time accuser, judge, jury and executioner, even of a crime committed in his presence. There are a few exceptions to this rule, but they are mere exceptions, not the rule itself. The law watches them with jealous care, and endeavors to protect the rights of the people by another rule, that whosoever undertakes to resist or redress a supposed wrong without a resort to the law, acts at his peril, and takes all the risk of any mistake in the case. Thus did the defendant take the risk of the uttermost damages that could be recovered against it, in case a court of justice, sitting in review of the conductor's acts, should hold them unwarranted.

4. It is to be observed that in their dealings with the plaintiff, the baggage-master and the gateman acted strictly within the limits of their respective duties, and it was therefore beyond the power of the railroad company, their principal, to escape responsibility for their acts. Sound public policy sternly forbids any relaxation of this salutary rule. If the baggage-master had refused to check plaintiff's baggage because of the omission, he would at once have gone to the ticket office and had the omission supplied. If the gateman had made a like refusal

to admit plaintiff to the train, a like compliance with the condition in question would have been secured. And it was as much the duty of those agents to notice the omission, and reject the ticket till the omission had been supplied, as it was the duty of the passenger to remember and comply with it. All this the conductor must be conclusively presumed to have known, and his conduct in assaulting, maltreating and expelling the plaintiff must, accordingly, be held the wrongful acts of the company, for which it is liable in damages.

The conductor had ample means to settle any question of the identity of the passenger, if such a question had arisen. He could have called for the baggage-check, could have required plaintiff to write his name, and to show by any papers or letters at hand, or otherwise, according to the circumstances, his identity with the person named in the ticket. No such question was raised. On the contrary, the conductor, by his conduct, admitted that identity. And he expelled the plaintiff with great violence from the train, not for any pretended misconduct, nor for attempting to steal a ride, but simply and only for non-compliance with a form that might, or might not be, a matter of convenience to the carrier.

5. But suppose the ticket had expressly provided that for a non-compliance with any of its conditions, the passenger should forfeit the fare paid, and should be expelled from the train; and that if he should resist such expulsion he should be subdued by force, even to blows, and the like, could it be plausibly argued that such a provision would not be flagrantly against public policy, and void as con-

trary to the settled principles of the law? But while no railroad company would dare express such a monstrous claim of arbitrary power on the face of its tickets, the claim, in all its revolting barbarity, is boldly made, without any other support than the shadowy foundation of a supposed implication. An agreement that if one should violate a contract, the other party might reduce him to bondage, or imprison him, or beat him, would be driven from the judgment seat in scorn; but how would such a provision differ, in principle, from one that for a mere breach of a minor incident of a contract of carriage, the passenger may be violently expelled from the train?

The right of expulsion for gross misconduct, or for intrusion without color of right, in good faith, stands on a radically different ground, and arises wholly without the common domain of contract rights.

No condition, regulation or restriction of the common right of carriage can be tolerated by the judicial authority, that could not be applied with equal propriety to all classes of passengers; to the wife as well as to the husband; to the common people as well as to judges and statesmen. But it is not alone the humbler classes of mankind who would be likely to overlook or forget such a requirement. An occasional absence of mind, or lack of remembrance, is oftener found among philosophers and scholars than among those who throng the common walks of life.

The entire burden of the case rests on the carrier who sets a radical departure from common right, and common usage. Every presumption of fact, and every intendment of law is against him. Every

doubt must be resolved in favor of the public, that is, in favor of the passenger.

But this is a country of equal rights, privileges and protection, so far as the theory of our government is concerned. Hence, if the carrier may resort to force for the maintenance of its rights, the passenger also, if he be in the right, may protect himself in the same manner. This would restore the wager of battle in its simplest form, and would substitute the first tribunal of barbarism for the last tribunal of civilization. This is the test of mutuality. Now suppose the ticket had been duly restamped, and the baggage master had refused to check the baggage, or the gateman to admit to the train, or the conductor to accept the ticket, would the passenger have been justified in so much force as he should have found necessary to secure a recognition of his rights? And if the passenger would not be justified in such a course, can a powerful corporation successfully claim the right to resort to violence for the enforcement of a contract, instead of appealing to the courts, or the law-making power for relief? These questions show the absurdity of the defendant's claim.

The argument leads irresistibly to the conclusion that all such tickets as that introduced in evidence are, from their very complexity, gross violations of public policy and the rights of the traveling public, and should be annulled by the judgment of this court. "Iron-clad" railroad tickets are irreconcilable, alike with the principles of justice, and the rights of the people.

6. The contract of the carrier was to carry the passenger safely, and protect him from injury to the utmost of human care and foresight. And in case

of an injury of the passenger, *the carrier is bound to prove* that his agent was a person of competent skill, good habits, and in every respect qualified, and suitably prepared for the business in which he was engaged, *and that he acted on the occasion* with reasonable skill, and *with the utmost prudence and caution.*

Stokes v. *Saltonstall*, 13 Peters, 190.

But in the present case, the carrier was not required to prove anything, and the plaintiff's evidence showed that the conductor made no attempt to satisfy himself of the identity of the passenger, but without any prudence or caution, expelled him, for no other cause than non-compliance with an unimportant form. Indeed, the contention of the defendant would make the return ticket, in effect, a fraud; for, if absolutely void without the second signature and stamp, the passenger's money for the return trip was taken for the mere privilege of obtaining a ticket for it at the outward terminus, with a condition of forfeiting the amount for any mistake in complying with the conditions imposed. Sound public policy absolutely forbids any such tampering with the people's common right of carriage.

7. Where a BY-LAW of the railway company provided that no passenger should enter any carriage of the company, or ride therein, without first paying fare and procuring a ticket, and that he should show the ticket when required, and deliver it up before leaving the carriage, and a passenger procured tickets for himself, and his servants, and the latter were allowed to enter the car upon the master telling the guard that he had tickets for them, and without requiring the production of the tickets for the servants, and the servants were afterward ex-

pelled for a failure to show their tickets, it was held that the master was entitled to recover damages for the expulsion.

Jennings v. *Great Northern Railway Co.*, Law Reports, 1 Q. B. 7.

Conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade, or otherwise, to disclose the truth, may often have the effect of an estoppel.

Bigelow on Estoppel, 553.

The same principle manifestly applies to any other duty cast upon a person, by the neglect or omission of which another person may be injured. So in this case, the duty was cast upon the baggage-master to examine the ticket, and not to check the baggage of the passenger upon it, unless it would entitle the passenger to go in the same train with his baggage. The same rule applies to the gate-man. The duty was cast upon him to refuse to admit any person to the train without a ticket entitling him to ride in the cars of that particular train. For all the purposes of the journey, those officers and the conductor are to be considered as "the corporation itself."

Bass v. *Railway Co.*, 36 Wis. 450.

A party can not occupy inconsistent positions, and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts.

Bigelow on Estoppel, 578.

In this case, if the defendant had refused to check plaintiff's baggage he could have had his ticket re-

stamped; but the company elected to check the baggage, take it from the passenger, and send it to Chicago, without the re-stamping of the ticket. If the company had raised the same question at the gate to the train, the passenger could then conveniently have complied with the condition, but when it again waived the omission, and accepted the ticket as sufficient, the right to insist upon a compliance with that condition, was gone forever.

8. The recent English case of *Butler* v. *Manchester, etc., Railway Co.*, is very much in point, and well illustrates the fact that we have to wait very much longer for a precedent on a self-evident point, than for a decision upon a question of real doubt and difficulty. In this case the English High Court of Appeals reverse the judgment of the court below, and hold that *there is no implied authority to expel a passenger for a mere violation of the contract of carriage.* The right of expulsion is manifestly held to be limited to cases of misconduct outside of the contract, and not merely in violation of it. In that case there was a by-law requiring the passenger to show his ticket and deliver it up when requested, and in default thereof to pay full fare. The passenger lost his ticket, refused to pay fare, and was removed from the train by force. *Held:* that he was entitled to recover.

Lord Esher, M. R., said: The company can only make by-laws and regulations in pursuance of their statutory powers. The contract really is, that on paying the fare for the journey, the carrier will carry him thereon, in their carriage, *using due care for his safety while so doing.*

Lord Esher intimates that a requirement to

re-pay full fare in such a case might be held unreasonable. But he adds, assuming it to be valid, and that the passenger refuses to do so and breaks his contract, does it result that the company's servants may lay hands on him and remove him from the carriage? I do not think that it does. The remedy is by proceeding against him for the amount of the fare he refuses to pay. Where is there any contract by which he has agreed that if he fails to show a ticket, or pay the fare mentioned in the regulation, the company may lay hands on him and put him out of the carriage by force? No one has any right to lay hands forcibly on a man, in the absence of some legal authority to do so, or some agreement to that effect. It is argued that such right on the part of the company must be implied, but no court has a right to imply any term, as between parties, which was not clearly and obviously within the contemplation of both the parties, and I can not agree with the learned judge in the court below in holding that such a term should be implied. For these reasons I think his decision was wrong, and that judgment should be entered for the plaintiff.

LINDLEY, L. J., said: I am of the same opinion. The question raised in this case is of great importance, both to the company and the passenger. If the passenger broke the contract, the remedy is to take proceedings for the breach. It is argued that having broken the contract, the passenger was no longer lawfully on the carrier's premises, but this does not appear to me to be so, and having failed to show that plaintiff was unlawfully in the carriage, the company had no right to remove him by force.

LOPES, L. J., said: It is somewhat extraordinary that there should be no authority on such an im-

portant point. To my mind the case is very clear. There is no by-law or regulation which can be relied on, and whether any could be framed that would afford protection in such a case, I doubt. The plaintiff had, admittedly, properly taken his ticket for the journey and back, and had paid the full fare for the journey, and, admittedly, he had lost his ticket accidentally. I find no evidence whatever of any contract that in such a case the company might lay hands on him and remove him. Their remedy would be by proceeding for the amount of the fare, which he refused to pay.

Butler v. *Manchester, etc., Railway Co.*, 21 Law Reports, Q. B. Div. 207.
High Court of Appeals, 1888.

But in Boylan's case there was no provision for collecting additional fare, much less for his forcible expulsion. The provision that unless all the conditions of the ticket should be fully complied with, must work both ways. If not void, as unreasonable and against public policy, as it seems clear that it should be held to be, this provision must bind the carrier as well as the passenger, and if the ticket is valid enough to authorize the carrier to keep the fare paid, it is valid enough to entitle the passenger to ride. The sense of justice revolts at the idea of expelling the passenger while the return fare was retained.

9. A recent decision of the Supreme Court of Ohio supports the plaintiff's case. It is well settled, says that court, that the purchaser of a railroad ticket does not, by its mere acceptance, acquiesce in and bind himself to all the terms and conditions printed thereon, in the absence of actual knowledge of them. Boylan should

therefore have been permitted to testify when he first actually knew that the ticket should have been re-stamped at Hot Springs.

There is nothing, says the Ohio court, in the circumstance that the ticket was sold at a reduced rate of fare, to take it out of the rule. The rate was the usual and established one for a numerous class of patrons. The company saw fit to dispense with the signing of the ticket, and thereby waived that requirement, and its conductor was not justified, while it still retained the plaintiff's money, in ejecting him from its cars for his failure to sign the ticket, and to pay the usual fare in money for a passage for which he had already paid. The point was made that the provision was against public policy, and would have been void if signed, but that point was not decided.

Kent v. *B. & O. R. R. Co.*, 12 N. E. R. 798, Ohio, S. C., June 28, 1887.

10. A provision in a policy of insurance, that no officer, agent or representative of the insurance corporation should be held to have waived any of the conditions of the policy, unless such waiver shall have been endorsed thereon, is ineffectual to limit the legal capacity of the company to afterward bind itself contrary to the conditions of the policy, by any agent acting within the scope of his general authority. The provision not being a limitation upon the authority of any particular agent or class of agents, but in effect upon the capacity of the corporation for future action, is void.

Lamberton v. *Ins. Co.*, 39 N. W. Rep. 76, S. C. Minn. 1888.

The provision of Boylan's ticket that no agent of

the carrier should have any power to alter, modify, or waive any condition of the ticket, was therefore void on the above ground, as well as for being contrary to public policy, because unreasonable.

11. By "public policy" is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good. The common law will not permit individuals to oblige themselves by a contract to do, or not to do anything, when the thing to be done or omitted is, in any degree, clearly injurious to the public. If a contract bind the maker to do something opposed to the public policy of the State, or the Nation, or which conflicts with the wants, interests, or prevailing sentiments of the people, or our obligations to the world, or is repugnant to the morals of the times, it is void, however solemnly made. It is the tendency of the class of contracts to which an agreement belongs which determines its validity, and not the fact whether in the particular case it had any prejudicial effect. An agreement never to vote by proxy on stock, was held void. So was an agreement never to plead the statute of limitations. Contracts to protect carriers against actions for damages resulting from their negligence, or that of their agents or servants, have been held void in numerous cases. The great object of the law of common carriers was to secure the utmost care and diligence in the performance of their important duties, an object essential to the welfare of every civilized community. The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. In most

cases he has no alternative, but must submit to the terms offered.

Greenhood on Public Policy, 1, 2, 5, 502, 504, 510 *et seq.*, and numerous cases cited.

In Boylan's case the baggage-master and the gateman were clearly guilty of negligence in accepting the ticket without the return stamp, and for that negligence the company, not the passenger, should be held responsible.

But if two regular employes of the company overlooked the non-compliance with the condition in controversy, how much more might an ordinary passenger be expected to do so. This fact shows that the condition tends to produce mistakes, accidents and oppression, and that it is therefore against public policy and void.

It is therefore respectfully submitted that all such complicated and unusual appendages to railroad tickets should be annulled by the appropriate decision of this court. There is no relation between such conditions and a reasonable rate of fare. There is no good ground on which they can be supported. The return ticket can be used only for a return trip, and the danger of an improper use of it is trifling, and any resulting damage merely imaginary.

12. That the Circuit Court erred in refusing to allow the plaintiff to testify to the damage to his business, and show the loss of his earnings and profits in consequence of the injuries resulting from his expulsion and maltreatment, is very plain from the authorities.

The only difference between the measure of damages in actions of contract and actions of tort, is in

the matter of exemplary damages. In both, full compensation may be given, and in tort something may be added by way of punishment.

As a general rule, special damage to business, or special loss by reason of special circumstances, should be specially averred and proven. Such damages are so averred in Boylan's case, and he offered to prove them, but the court below refused to permit him to do so.

Hunter v. *Stewart*, 47 Me. 419.

13. The following citations from the late work of Sutherland on Damages, with cases cited, are in point:

"*a.* In actions upon contracts, the losses sus-
"tained do not, by reason of the nature of the trans-
"actions which they involve, embrace, ordinarily,
"any other than pecuniary elements. There is,
"however, no reason why other natural and direct
"injuries might not justify and require compen-
"sation. Contracts are not often made for a pur-
"pose, the defeating and impairing of which can, in
"a legal sense, inflict a direct and natural injury to
"the feelings of the injured party. A breach of
"promise of marriage is an instance of such a con-
"tract, and such considerations enter into the esti-
"mate of the damages. The action for such a cause
"is often referred to as an exceptional action. In
"a certain sense it is so: but in the particular case
"under consideration, it is only peculiar. It is an
"action upon contract, and the damages allowed
"are such as, considering the nature and benefits
"of the thing promised, will be an adequate com-
"pensation. They being of a personal nature, can
"not be wholly measured by a pecuniary standard;
"the cause of action, for the same reason, does not

"survive; it dies with the person, as all demands "for personal injuries do. They are recoverable by "the injured party because they proceed directly "and naturally from the breach.

1 Suth. Dam. 156.

"*b.* In an action for breach of a contract to con- "vey the plaintiff, on a steamship, from London to "Sheerness, where the breach consisted in put- "ting the plaintiff off without just cause, short of "his destination, with circumstances of aggravation, "it was held proper to show these circumstances, "and Park, B., thus remarked upon their admissi- "bility: 'Suppose, instead of a man landed at Grave- "send from a steamboat, this had been the case "of a passenger in a ship bound to the West Indies, "and he were put ashore on a desert island, with- "out food, and exposed to the burning sun and dan- "ger of wild beasts, or even landed among savages; "would not evidence be receivable to show the "state of the island where he was left, and the cir- "cumstances attending *the violation of the contract?*'

1 Suth. Dam. 158.

"*c.* The obligations or responsibilities of public "carriers do not arise altogether nor principally out "of contracts; they are mostly imposed by law.

"The total refusal to undertake the conveyance "of a passenger without excuse, when actionable, is "merely a violation of a carrier's duty; *he has re-* *'fused to contract;* so his duty to carry with care, "'though it may, to some extent, be regulated and "restricted by contract, is imposed by law, and can "not, as is generally held, be contracted away; "hence, actions against these carriers are generally "for neglicence, or for misconduct of some kind, "involving a breach of duty. Contracts, however,

"are usually made fixing the extent of the route, the "mode of conveyance, the kind of accommodations, "the time, etc.; and, therefore, actions founded upon "such contracts may be maintained.

"*Whether the action be upon breach of duty or* "*for violation of contract, to the extent that they in-* "*volve the same acts and omissions, the damages, as* "*measured by law, are substantiallg the same.*

"*d. A refusal, after a passenger has been carried* "*over a part of the stipulated voyage or route, to carry* "*him to the end, may entitle him to general, special or* "*consequential damages, for a great variety of losses* "*and injuries.*

"*e.* In an action against a carrier for a failure to "carry the plaintiff from New York to San Fran- "cisco, via Nicaragua, according to his agreement, "for neglect to furnish suitable accommodations, and "for negligent detention on the way, and conse- "quent unnecessary exposure to an unhealthy cli- "mate, it was held entirely proper to receive evi- "dence as to how much the plaintiff was exposed to "the sun and rains while crossing the isthmus, and "to show that the climate there was bad, so that "the jury could determine whether the plaintiff's "sickness was caused by the defendant's negligence "or breach of duty. It was also held that the time "the plaintiff lost by reason of his detention on the "isthmus, his expenses there and on his return to "New York, the time he lost by reason of his sick- "ness after he returned and the expenses of such "sickness, so far as it was occasioned by the defend- "ant's negligence or breach of duty, were legitimate "and legal damages, which the plaintiff was "entitled to recover. And the defendant having "refused to convey the plaintiff from the isthmus to

"his destination, he was entitled also to recover "back the money he had paid for his passage on the "stipulated voyage.

"*f.* In a recent case, *Goddard* v. *Grand Trunk* "*Railway*, 57 Me. 202, 213, which received very thor- "ough consideration, it was held that 'The carrier's "obligation is to carry his passenger *safely and* "*properly, and to treat him respectfully*, and, if he in- "trusts the performance of his duty to his servants, "the law holds him responsible for the manner in "which they execute the trust. The law seems to "be now well settled that *the carrier is obliged to pro-* "*tect his passenger from violence and insult, from what-* "*ever source arising.* He is not regarded as an "insurer of his passenger's safety against every pos- "sible source of danger, but he is bound to use all "such reasonable precautions as human judgment "and foresight are capable of, to make his passen- "ger's journey safe and comfortable. *He must not* "*only protect his passenger against the violence and in-* "*sults of strangers and co-passengers, but*, a fortiori, "*against the violence and insults of his own servants.* " * * * The law requires the common carrier "of passengers to exercise the highest degree of care "that human judgment and foresight are capable "of, to make his journey safe. Whoever engages "in the business, impliedly promises that his passen- "ger shall have this degree of care. In other "words, this is conclusively presumed, for the "law will not allow the carrier by notice or "special contract even, to deprive his passen- "ger of this degree of care. *If the passenger does* "*not have such care, but on the contrary is unlawfully* "*assaulted and insulted by one of the very persons* "*to whom his conveyance is intrusted, the carrier's*

"*implied promise is broken*, and his legal duty is "left unperformed, and he is necessarily responsible "to the passenger for the damages he thereby sus- "tains. *The passenger's remedy may be either in as- "sumpsit or tort, at his election.* In the one case he "relies upon a breach of the carrier's common law "duty to support his action; in the other upon the "breach of his implied promise. *The form of the "action is important only upon the question of dam- "ages. In actions of assumpsit the damages are gen- "erally limited to compensation. In actions of tort the "jury are allowed greater latitude, and, in proper cases, "may give exemplary damages.*'

3 Suth. Dam. 257-8, and authorities cited.

"(*g*) *The carrier must make compensation accord- "ing to the nature of the injury when the proper action "is brought; such injury may consist of personal in- "convenience, sickness, loss of time, bodily and mental "suffering, loss of capacity to earn money from per- "sonal injury, pecuniary expenses, disfigurement, or "permanent physical or mental impairment.* There is "no precise rule by which the extent of recovery "for pain and suffering can be measured; but it is "well established they are to be compensated when "they result from injuries received by the party "suing, from the wrongful acts or culpable negli- "gence of the defendant. The determination of "the amount is committed to the judgment and "good sense of jurors, subject to practical revision "by the court to correct and relieve from manifest "excess; and it seems to be now established that "not only bodily pain, but, connected with bodily "injury, mental suffering—anxiety, suspense, fright, "sense of wrong from insult or indignity— "may be treated, when the facts will justify it, as

"an element of the injury for which damages, for "compensation, should be allowed.

3 Suth. Dam. 259, and authorities cited.

"*h. Evidence of the loss sustained by the plaintiff* "*in his business in consequence of the injury received, is* "*proper, not as furnishing the measure of damages, but* "*to aid the jury in estimating them; and for this* "*purpose the nature of the plaintiff's business, its extent,* "*and the importance of his personal oversight and su-* "*perintendence in conducting it, may be shown. The* "*jury are to consider what, before the injury, was the* "*health and physical and mental ability of the plaintiff* "*to maintain his family or to earn money, as compared* "*with his condition in these particulars afterward and* "*up to the institution of the suit, in consequence of the* "*injury complained of, and how far it is permanent in* "*its results, as well as the physical and mental suffering* "*he has endured, and will endure, from such injury as a* "*cause, and should allow such damages as, in their judg-* "*ment, will fairly compensate the plaintiff therefor.*"

3 Suth. Dam. 261, and authorities cited.

See also Sedgwick on Damages, 5th Edition, p. 407, Note 2.

Baker v. *Drake*, 53 N. Y. 311.

Brewster v. *Van Liew*, 119 Ill. 562.

C. & A. R. R. Co. v. *Pillsbury*, 123 Ill. 9.

14. I therefore respectfully submit to the court that the judgment below should be reversed, with such directions as will enable the plaintiff to recover full compensation for all the injuries he has sustained in his mind, body, business and estate, from the wrongful acts of the defendant; and such an announcement of the law of the case as will be a suf-

ficient safeguard against the repetition of similar outrages in the future.

The contention that the passenger should meekly have submitted to the assault, and retreated to a place of safety, is not worthy of serious consideration. It would enable the wrong-doer to take advantage of his own wrong; and would ignore the instinct of resistance to aggression which is a universal characteristic of mankind. We need only to remember that the law was not made for angels, but for men.

C. C. BONNEY,
Counsel for Plaintiff.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1880.

PATRICK C. BOYLAN,
Plaintiff in error,
vs.
THE HOT SPRINGS RAILROAD COMPANY,
Defendant in error.

No. 1140.

REPLY ARGUMENT FOR PLAINTIFF IN ERROR.

BY CHARLES C. BOYLE,

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 1140. October Term, A. D. 1889.

PATRICK C. BOYLAN,
Plaintiff in error,
vs.
THE HOT SPRINGS RAILROAD COMPANY,
Defendant in error.

Error to the Circuit Court for the Northern District of Illinois.

REPLY ARGUMENT FOR PLAINTIFF IN ERROR.

With all respect, I submit to the court that the learned counsel for the defense seriously errs when he says that if the judgment now under review shall be reversed, the judgment of this court in *Mosher* v. *St. L., I. M. & S. R. R. Co.* must be overruled. As I read that case, it constitutes no obstacle whatever to the relief sought by the plaintiff. Mosher brought suit against the Iron Mountain road for a default of the Hot Springs Company, under a contract which expressly limited the liability of each road of the entire line, to its own territory. The court below held that there could be no recovery, and this court affirmed the judgment. No question of its propriety is raised in this case. But the attempt to extend the decision in that case so as to make it cover and decide questions not there presented to the court, is earnestly opposed.

So far from deciding what would have been the liability of the Hot Springs Company, if it had been sued, this court expressly say that the Mosher case does not require the expression of any opinion on that question.

Mosher chose to rest his case on his oral statement that there was no agent in the office to stamp his ticket, when he was ready to start. He raised no question of estoppel. He made no claim that his ticket bore evidence of its acceptance by the baggage agent and the gateman. He did not insist that the provision of the contract under which he was expelled was void as against public policy. He did not make the point that the contract did not authorize his forcible expulsion. Indeed it would be difficult to find two cases apparently similar, that differ more widely in the questions actually submitted to the court for judicial determination.

The attempt to uphold some grossly unreasonable and oppressive conditions of railway travel, on the ground that the passenger was induced to sign an agreement which included them, must surely fail. The sword of public policy cuts asunder with equal facility an *ex parte* rule or regulation, an oral agreement, a sealed obligation, or a municipal ordinance. What is contrary to public policy can not be upheld by anything which it is within the power of the parties to do.

In this case the supreme question is whether the expulsion of Boylan from the railway car was, under the circumstances, a violation of the common right of travel which the American people, young or old, learned or unlearned, wise or otherwise, male or female, are entitled to enjoy. That the expulsion was a violation of that right, common sense and common justice earnestly affirm; and in such a case the elaborate and complicated conditions of the so-called special tourist ticket only aggravate the evil. If railway tickets may be graded according to the intelligence and ability of passengers, what "traps to catch the unwary" might be devised for the counselors and judges who are engaged in the elucidation and application of the law. But

the right of travel is not only a common right—it is an equal right; and an adequate answer to occasional decisions of some of the State courts, sustaining invasions of that common and equal right, is that they are bad law, and should be met, not with approval or acquiescence, but with open and emphatic condemnation.

The great lines of travel do not need any protection at the hands of the courts, against the aggressions of individual passengers. The losses of common carriers through the fraud or misconduct of travelers, are singularly small, probably not a thousandth part of the losses inflicted on passengers through the negligence and misconduct of the agents and servants of railway companies. It is not the corporations, but the people that need protection at the hands of the courts. A very great injury to a passenger should not be left without any redress, because of a bare possibility that otherwise there might have been some small inconvenience or loss to the carrier.

The right of contract is often exaggerated. It is subject to the multitudinous limitations of constitutions, statutes and decisions; it is limited by the general welfare of society, as defined in the rules of public policy. While one may be relieved, by contract, from a merely private obligation, he can not, by contract, discharge himself from any duty which the general welfare of the people requires him to perform. It is obvious that the right of expulsion from a railway car must rest on substantially the same grounds as the right of expulsion from a dwelling or a place of business. A trespasser, or a person in the commission of a breach of the peace, may be expelled by necessary force, but it is perfectly clear that an assault upon, and forcible expulsion of an orderly person, for a breach of a contract, can never be justified, where the contract itself does not provide for such expulsion. How far it is lawful for a contract to provide that the parties, or one of them, may be his own judge of a violation of the contract, and substitute force for law in seeking a remedy, is a very different question; but he who affirms that such a contract is in harmony with a govern-

ment of law and justice has certainly an extremely difficult undertaking in hand. In Boylan's case there is no pretense that the contract purported to give the carrier the right to decide any question that might arise under it, and to execute by force the judgment of its servants. The spectacle of a railway corporation appealing to the courts of justice to sustain its claim of a power to "knock down and drag out" any passenger who might, by innocent mistake, violate some petty rule, regulation or ticket provision, would be ludicrous, if it were not revolting. The English High Court of Appeals is right. There is no principle of law on which expulsion in such a case can be justified.

I do not feel that any authorities are needed to support this reply, but there can be no impropriety in referring to a few utterances of this court, in harmony with the positions taken for the plaintiff in error.

In *R. R. Co.* v. *Derby*, 14 How. 486, this court say: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, PUBLIC POLICY and safety require that they be held to the greatest possible care and diligence." This language is repeated and emphasized in *Steamboat* v. *King*, 16 How. 474, as expressing the settled judgment of the court. Now, as it is fundamental that a contract which is in conflict with public policy is void, it follows that no valid contract can be made to authorize the carrier to assault and expel the passenger, instead of transporting him to his destination with "the greatest possible care and diligence." If the right of expulsion arises, it must be from the existence of facts which reverse the rule of public policy, and forbid that the passenger be permitted to continue in the train. And it is certainly safe to affirm that the right of forcible expulsion does not exist and can not be created, by contract or otherwise, in any case where a person is received as a passenger, and in good faith takes a seat in a railway car and starts on a journey, and tenders what he claims to be a proper ticket, or the proper fare, and otherwise conducts himself in an orderly

manner. Expulsion is not a lawful penalty for a difference of opinion between a passenger and the conductor, and there is no law which authorizes him to decide any such difference of opinion. The time for the railway company to inspect and pass upon tickets is before the passenger has been admitted to the train and commenced the journey, not afterward. This must be the law, because it is fundamental, in court and out of court, that an objection which might be cured if duly made, shall not be made after the opportunity to remove it has passed.

The reason why a common carrier may limit his common-law liability for the transportation of property, is stated by this court in *York Co.* v. *R. R. Co.*, 3 Wall. 112. It is that the transaction concerns the parties to the contract only; that it simply involves rights of *property*, and the public can have no interest in the matter. But the carrier "can make no discrimination between *persons*, or vary his charges from their condition or character." Yet the Hot Springs Railroad Company insists that its "special tourist ticket" completely supersedes the rules of public policy, and leaves the holder of such a ticket, in which the slightest irregularity can be detected, without any rights which its conductor "is bound to respect." The safe transportation of the humblest member of society is a matter which concerns all, from the lowest to the highest, and hence the reason that permits a limitation of the liability for property, can never exist in the case of human beings.

The substance of defendant's claim is that it is exempt from liability under the special conditions of the ticket issued to Boylan. On this claim, the case of *Railroad Co.* v. *Lockwood*, 17 Wall. 357, is in point. This court, after an elaborate review of leading decisions, say, among other things:

In regard to passengers, the highest degree of carefulness and diligence is exacted.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million.

We regard the English statute of 1854, which declared void all notices and conditions made by common carriers, except such as the judge, at the trial, or the courts, should hold just and reasonable, as substantially a return to the common law.

This court censure the abnormal course of those courts that have exalted the right of contract above the policy of the law, and the fallacious notion on which the decisions in question rest.

It may be conceded that special contracts, made by common carriers with their customers, limiting their liability, are good and valid, so far as they are just and reasonable, but not further.

In Boylan's case, the railway company pleads its special contract, in justification of the expulsion. The answer is threefold.

1. The contract does not attempt to authorize expulsion in any case.

2. If it did provide for expulsion, for any mistake or mere non-compliance with the details of the contract, the provision would be void as being contrary to public policy.

3. The special contract is too complicated to be understood and complied with by the general traveling public, and for that reason also should be held void.

The evidence shows that the attention of the plaintiff was not called to the provision for restamping the ticket, when it was sold to him. (Record, 25.)

The plaintiff now appeals to this court, upon the merits of his case under the ticket in question, to also hold:

1. That under the circumstances set forth in the record, he was absolutely entitled to make the return journey for which the railway company checked his baggage, admitted him to the train and carried him away from Hot Springs, after twice inspecting his ticket.

2. That for the omission to have the ticket re-stamped at Hot Springs, the railway company was much more to blame than the ticket-holder.

3. That the assault upon, and expulsion of the plaintiff from the train were absolutely without justification or excuse, and he is consequently entitled to full compensation for all the injury thereby inflicted upon his person, his business, and his capacity to earn money.

4. That the assault and expulsion were specific breaches of the contract to carry the plaintiff safely; that the only difference between the measure of damages *ex contractu*, and the rule which fixes them *ex delicto*, is that in the latter class of cases exemplary damages may be added by way of punishment to those actually shown by the evidence, and that no jugglery with the technicalities of pleading, practice or proof will be permitted to prevent the plaintiff from recovering full compensation for the wrongs and losses suffered from the unlawful conduct of the defendant.

5. That the courts of justice will not tolerate a resort to force and violence as a substitute for the remedies provided by the laws, for any mere non-performance of a contract.

This court will take judicial notice of the public administration of justice, and will recognize the important fact that to a large extent the great carrier corporations have usurped the functions of the courts. In all the States cases abound against railroad companies for unjust assaults, while a suit by such a company against a passenger for a breach of his contract, is almost unknown. And yet we boast of equal rights, and impartial justice! Only this high court can put an end to that usurpation. Only this high court can restore to the people their equality with giant corporations before the law.

CHARLES C. BONNEY,
Counsel for Plaintiff.

Office Supreme Court U. S.
FILED.
OCT 30 1889
JAMES H. McKENNEY
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 1140.

PATRICK C. BOYLAN,
Plaintiff in Error,
vs.
HOT SPRINGS RAILROAD COMPANY,
Defendant in Error.

Error to the Circuit Court for the Northern District of Illinois.

Submitted under Twentieth Rule.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

G. W. KRETZINGER,
SOLICITOR.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

No. 1140.

PATRICK C. BOYLAN,
Plaintiff in Error,
vs.
HOT SPRINGS RAILROAD COMPANY
Defendant in Error.

Error from the Circuit Court for the Northern District of Illinois.

Submitted under Twentieth Rule.

Brief and Argument for Defendant in Error.

We might well rest our reply upon the opinion expressed by this court in *Mosher* v. *St. Louis, Iron Mountain and Southern Railway Company*, 127 U. S., 390. The precise ticket contract there considered and construed with like provisions, is here involved and submitted by plaintiff for further review and consideration.

The judgment of the court below must be affirmed, or the decision and judgment of this court in the Mosher case *supra*, must be reversed. These two cases are parallel and analogous in every *contract* particular. As in *Mosher* v. *St. Louis, Iron Mountain and Southern Rail-*

way Co., supra, this is a suit by plaintiff against defendant for putting him off its train.

In the case at bar the declaration presents two distinct causes of action; one in assumpsit for breach of contract—the other in trespass for personal injury. The personal injury received from the force used in expelling plaintiff from the train is the real gist of the action, although it professes to be for a breach of contract.

STATEMENT.

Plaintiff alleges in his declaration, that March 18, 1882, he purchased from the Wabash, St. Louis and Pacific Railway Company, in Chicago, a ticket for transportation from Chicago to Hot Springs, and conditionally good for a return passage. This ticket contained a "*tourist contract*" signed by the parties, in which (plaintiff avers, among other things) it was agreed (1) that the same was issued by said Wabash, St. Louis and Pacific railway, (2) that it was so issued as a special tourist ticket, (3) that it entitled the plaintiff to a first-class passage over the railroads named to Hot Springs in the State of Arkansas, and to a like passage to return to the city of Chicago, (the three routes being the Wabash, St. Louis and Pacific Railway Company, the contracting company; the St. Louis, Iron Mountain and Southern Railway Company, and the defendant Hot Springs Railway Company); (5) that in consideration of the reduced rate at which the ticket was sold the purchaser made and signed an agreement thereon, with the several

companies over whose lines (lines aforesaid) the ticket entitled him to be carried, which agreement contained in substance, the following provisions, to wit: (1), that the said Wabash, St. Louis, and Pacific railway limited its own responsibility for the carriage for which the ticket was issued to its own line of railroad, and acted only as the agent of the other lines of railroad over which the transportation was to be made. (Therefore, an estoppel by the act of any one of these lines could not extend to or bind the other.) (2.) That the ticket should not be transferable, etc. (3.) That any alteration of the ticket should render the same void, etc. (5.) That the ticket should not be good for the return passage unless the holder thereof should identify himself, as the original purchaser, to the satisfaction of the authorized agent of the Hot Springs railroad, at Hot Springs, in the State of Arkansas, within fifty-five days from the date of the sale thereof, and that it should be good therefor only when officially dated and signed in ink, and duly stamped by said agent, and that thereupon the same should be good for the return passage only, for five days from the date last aforesaid. (6.) That the purchaser agreed to sign his name and otherwise identify himself, as such, whenever called upon to do so by any conductor or agent of the lines over which the carriage was to be made according to the reading of said ticket. (9.) That the signature of the purchaser to the contract should be in ink. (10.) That unless all the conditions of the ticket should be fully complied with it should be void. (11.) That the purchaser should not hold any of the lines of railroad, meaning the owners and proprietors of said lines, liable for, or on account of any statement not in accordance with the contract made by any person employed on any of said lines,

and (12), finally, that no agent or employe of any of said lines had any power to alter, modify or waive in any manner any of the conditions named in the contract.

The foregoing conditions as averred in the declaration appear in the transcript, pages 4 and 5. The full ticket contract offered in evidence by plaintiff appears in the printed record, page 31, so that plaintiff pleads and proves the agreement and the conditions therein which he was to perform on his part, and his failure so to perform. All the foregoing conditions and agreements were involved in the Mosher case *supra*, but this court did not find it necessary in the determination of that case to give legal construction to all these provisions, but by the opinion of the court its judgment was based upon the first, fourth, fifth, sixth and twelfth conditions above recited.

Plaintiff's excuse for his non-performance of this *condition precedent* as averred in his declaration, is, that (transcript 6) in the hurry thereof (of his departure), he did not notice or remember that his said ticket was required to be "dated, signed and stamped at said Hot Springs, etc," and upon this "hurry" or want of recollection, he predicates and invokes the doctrine of estoppel against the defendant company.

Plaintiff avers in his declaration that he made this contract with the Wabash, St. Louis and Pacific Railway Company in the city of Chicago, for an outward passage to Hot Springs and return, according to the conditions and terms therein written. Over the contracting line he passed from Chicago to St. Louis, and thence over the St. Louis, Iron Mountain and Southern Railway Company (defendant in the Mosher case, *supra*), to Malvern in the State of Arkansas, and from Malvern to Hot Springs in the State of Arkansas, over the line of the

defendant in the case at bar. The outward journey from Chicago to Hot Springs was taken, and no complaint is offered thereto, but when plaintiff, having omitted to execute the contract for the return passage, attempted to make his return journey to Chicago, he first presented his unexecuted tourist ticket-contract to the baggage-agent, and thereupon his baggage was duly checked as requested by him. He then presented the same unexecuted tourist ticket-contract to the gate agent, and was admitted to the cars. He then avers, his omissions were cured, and that the *unexecuted* contract, void upon its face became valid; not by reason of anything appearing upon the face of this contract, but by reason of occurrences *dehors* the contract, (contrary to its express provisions), of which he was to be the sole presentor to the conductor, and the conductor was to accept such statement as true and recognize his company bound thereby, not only the Hot Springs Company from Hot Springs to Malvern, but the St. Louis, Iron Mountain and Southern Railway Company, from Malvern to St. Louis, and the Wabash, St. Louis and Pacific from St. Louis to Chicago. The court will observe that here were three railroad companies with which to deal, and the estoppel is averred against one, the defendant.

But plaintiff further avers in his declaration that on the same day after he was ejected from the train of the defendant company at Lawrence, the first station out from Hot Springs towards Chicago, he returned from Lawrence to Hot Springs, and at Hot Springs he did have his ticket dated, signed and stamped, and immediately proceeded from Hot Springs to Chicago, traveling upon said ticket.

Objections to evidence and motion to withdraw evidence

from the jury, interposed and made by the defendant, and the grounds upon which such objections and motions proceeded and the judgment of the court below sustaining such objections and motions, are fully sustained by the decision of this court in the Mosher case, *supra*. These objections and motions, and the grounds therefor, appear in printed record, pages 25, 29, 30, 37 and 38. Without the decision in the Mosher case, no authorities would be required to justify the ruling of the court below in sustaining these objections and motions, but this decision is so conclusive of this case in its construction of a like "tourist" ticket contract, *here* involved, that any special reference to or argument in support of these rulings is wholly unnecessary.

ARGUMENT.

I.

Counsel for plaintiff seeks to avoid the effect of the decision of this court in the Mosher case, *supra*, upon two grounds: *First*, by reason of the estoppel averred in the declaration, and *Second*, that the requirements of the ticket contract were unreasonable.

A brief examination of the two cases will clearly demonstrate that both of these questions were before this court in the Mosher case, and were fully considered, and decided in favor of the railroad company and against the ticket-holder, *and this decision sustains every ruling of the court below;* IN FACT, THE RULINGS OF THE COURT BELOW WERE EXPRESSLY BASED UPON THIS DECISION.

The correctness of these rulings depend upon the legal construction to be given to the conditions contained in this ticket contract, as in the Mosher case, in which this court held (127 U. S. p. 393): "The "right of this plaintiff to be carried upon the defend- "ant's train, without paying additional fare, does not de- "pend upon his having been received as an ordinary pas- "senger, or upon any representations made by a ticket- "seller, conductor, or other officer of the company, as to "his right to use a ticket, but wholly upon the construc- "tion and effect of the written contract, signed by him, "upon the face of the ticket (of the kind called 'tourist's' "or 'round trip' tickets) sold him by defendant for a "passage to Hot Springs and back, by which, in con- "sideration of a reduced rate of fare, he agreed to the "following terms, etc."

So this court distinguishes between the ordinary ticket and this "written contract, signed by him, upon the face of "the ticket."

An ordinary ticket is not a contract between the purchaser and the railway company, but is only the evidence of the receipt of so much money for a single fare.

In *Logan* v. *H. & St. J. R. R. Co.*, 12 Am. & Eng. R. R. Cases, 142, the court held: "A ticket cannot be "said to be either the contract or to contain the contract. "The settled opinion is that it is a mere receipt taken, or "voucher adopted for convenience, to show that a pass-"enger has paid his fare from one place to another."

In the case at bar, as well as in all like cases, the tourist ticket contract proceeds upon a special agreement dependent for its consideration upon the reduced rate of carriage, and thus in the fifth paragraph of the tourist contract above cited it was provided that "*in considera-*"*tion of the reduced rate at which the ticket was sold the* "*purchaser made and signed an agreement thereon with* "*the several companies over whose line the ticket entitled* "*him to be carried*," etc.

II.

So far the case at bar and the case of Mosher v. *The St. L., I. M. & S. Ry. Co. supra, are identical*, but at this point in argument counsel for plaintiff, admitting that this contract so entered into by plaintiff, required him to re-sign, identify and have duly stamped the ticket contract in question at Hot Springs before and with the Hot Springs agent, assert that this requirement was released and rendered unnecessary by the estoppel pleaded in the declaration. The estoppel

averred, is, that the baggage agent checked the baggage upon the presentation of the tourist ticket contract without the same having been signed, and without the holder thereof having identified himself before the agent at Hot Springs, and having the ticket stamped by the Hot Springs agent, and that the gate-keeper of defendant, upon the ticket being presented, passed plaintiff through the gate and allowed him to take the train, and thereby defendant, by reason of this act of the baggage-master and gate-keeper, "became and ever "since has been and still is wholly estopped to set "up and insist upon all or any of the matters and "things so as aforesaid omitted from said ticket," and that such estoppel raises an undertaking and promise on the part of the defendant company, not to object to or reject the ticket, but to accept the ticket without such identification of the purchaser, or without the same being stamped and signed by the Hot Springs agent.

In the Mosher case (127 U. S., 394), as to the necessity for the stamp, this court held "*By the express contract* "*between the parties, therefore, the plaintiff has no right* "*to a return passage under the ticket, unless it bore the* "*stamp of the agent at Hot Springs.* SUCH A STAMP "WAS MADE BY THE CONTRACT A CONDITION PRECEDENT "TO THE RIGHT TO A RETURN PASSAGE, AND NO AGENT "OR EMPLOYE OF THE DEFENDANT WAS AUTHORIZED TO "WAIVE THAT CONDITION."

The facts pleaded cannot in any sense constitute an estoppel or distinguish this case from the case of Mosher, supra.

Had defendant's conductor allowed plaintiff to ride to Malvern upon this unexcuted contract, upon his statement that his baggage had been checked, and he had been passed by virtue of this ticket in its unexecuted condition

to the train, neither of the other lines would have been bound by the act of defendant's conductor in so carrying plaintiff, and as found in the Mosher case, would have been fully justified in compelling him to pay his fare from Malvern to Chicago, or to have ejected him from the train. In the Mosher case there was no agent at the Hot Springs office when Mosher appeared for the purpose of identification and re-execution of his ticket contract, and the Hot Springs company (defendant in this case) carried Mosher to Malvern, and yet this court would not recognize that act of defendant's conductor as an estoppel in any sense, or as creating any right on the part of Mosher to be further carried by reason of his having been carried over defendant's line.

If the act of defendant's conductor, in receiving the unexecuted ticket of Mosher and allowing him to ride thereon, would not create an estoppel, how could the act of the baggage-master and gate keeper of the defendant company create an estoppel?

With full knowledge, (which is not denied), of paragraphs 11 and 12, and all other conditions appearing in this special ticket contract, plaintiff was clearly advised, and he expressly agreed that all authority was expressly withheld from any agent or employe of any of these lines to alter, change or modify the terms of this ticket contract in any degree or in any manner whatsoever, and the plaintiff agreed that no act of any of these agents or employes should be taken or treated by him as an attempt on their part in anywise to change or modify the terms of this ticket contract, and that he would assert nothing by reason of any act or statement of that character on the part of any agent or employe of either of these three companies.

In Mosher, *supra*, this precise condition was considered (127 U. S., 394) and of it this court held: "The 12th "condition states that the plaintiff understands and ex- "pressly agrees that no agent or employe of any of the "lines has any power to alter, modify or waive any of the "conditions of the contract.

"By the express contract between the parties, therefore, "the plaintiff had no right to a return passage under the "ticket, unless it bore the stamp of the agent at Hot "Springs. Such a stamp was made by the contract, a "condition precedent to the right to a return passage, *and* "*no agent or employe of the defendant was authorized to* "*waive that condition.*"

The construction your Honors here place upon this clear and emphatic limitation expressly eliminates from all consideration any act of the baggage-master or gate-keeper, or other employes of defendant company, and relieves any act of theirs, or either of them, from any effect whatever, either in the nature of an estoppel, or a waiver.

No act can be pleaded as an estoppel when the party pleading it has expressly agreed beforehand that such an act shall not constitute an estoppel or waiver in his behalf, and to recognize or enforce the same would not only be contrary to the express terms of the contract, but would be an express and direct violation of every rule recognized in law or in equity in the enforcement of contracts.

No argument ought to be required in support of this obvious rule so essential to the enforcement of contracts, and so manifestly necessary to prevent their easy violation and disregard.

But it is not averred in the declaration that either the baggage-master or gate keeper made any statement con-

cerning this unexecuted ticket contract, so that the estoppel arises from the act and not from any statements or representations made by these two employes. The following is the entire testimony offered to the jury and excluded by the court below, touching the acts of these two employes:

(Transcript 26.) "I went to the baggage office and "asked the baggageman to check the baggage. He "asked to see the ticket and I showed it to him. He "looked at it and asked where I wished the baggage "checked—St. Louis—and I replied to Chicago, and he "punched the ticket and checked the baggage and gave "me the check back.

"Q. State what transpired between you and the gate-"man.

"A. He wanted to see my ticket, and I showed it to "him, and passed through the gate and took my seat in "the car.

"Q. Did the gate man take the ticket from your "hands?

"A. I could not say that he did."

This evidence is not sufficient to establish an estoppel, even if the exercise of any authority by these employes had not been expressly prohibited by the contract in question.

The doctrine of estoppel herein invoked by plaintiff in error presents the further questions:

1. If the Hot Springs company, contrary to the express conditions of this ticket contract, might become estopped by any act of its baggage-master or gate-keeper would such estoppel extend to and affect the other two lines? Or would the estoppel be limited to the defendant company and thus divide an otherwise entire contract?

2. If the baggageman or gate-keeper of the defendant company could not create an estoppel which would bind the other two lines, the Iron Mountain from Malvern to St. Louis, and the Wabash, the original contracting party from St. Louis to Chicago, how would plaintiff be benefited by insisting that he should be carried from Hot Springs to Malvern, be ejected from the Iron Mountain road after leaving Malvern, then be compelled to return to Hot Springs to execute his ticket as therein required, before and with the Hot Springs agent, instead of being compelled to leave the defendant's train at Lawrence, the first station out from Hot Springs, and return from thence at the loss of less time and expense?

3. If the defendant company was estopped by the mere passive acts of its baggageman and gate-keeper, in checking his baggage and passing him through the gate to the train, so that he was entitled to his return passage by virtue of such estoppel, notwithstanding his omission to execute his contract with the Hot Springs agent for his return passage, then his voluntary act in returning from Lawrence, when expelled, and executing such contract for return passage, entering upon the train of defendant for such return passage, and his carriage to Chicago constituted, (1), a full performance of the contract on the part, not only of the defendant company, but of all the other lines over which said ticket extended between Hot Springs and Chicago, and (2), an express waiver by plaintiff of the alleged estoppel.

The familiar maxim that a waiver of an estoppel, or a rejected estoppel, is set free, needs no citation of authority.

4. Plaintiff invokes the doctrine of estoppel to relieve him from the omission to perform his part of the contract, and yet asserts in argument that the con-

tract which he was relieved from performing as therein written, by such estoppel is unreasonable. These two positions are wholly inconsistent. The former being prohibited by the contract—the plaintiff agreeing that no estoppel should arise by reason of the act of any agent or employe, and the second, because if such prohibition and limitation were unreasonable, and therefore contrary to public policy and void, no estoppel could be created with relation thereto.

This ticket covered three lines of road, the Wabash, from Chicago to St. Louis; the Iron Mountain, from St. Louis to Malvern, and the defendant, the Hot Springs road, from Malvern to Hot Springs. The distance between the last two points is about twenty miles. It is clear, that if estoppel applies at all, it applies to the entire contract over all these lines. It cannot be a contract by estoppel from Hot Springs to Malvern, and not from Malvern to St. Louis, and equally so from St. Louis to Chicago. It was the act of plaintiff in identifying himself and signing the return contract before defendant's agent at Hot Springs, and the stamping and signing of such ticket by such Hot Springs agent, that was to constitute a contract with, and good as against the Iron Mountain and Wabash railways, for a return passage.

This precise point is fully considered and clearly decided in *Mosher* v. *St. L., I. M. & S. Ry. Co., supra*, by this court. In that case plaintiff in error alleged that he presented himself at the Hot Springs office, and no ticket agent was present to join him in the re-execution of the contract for the return trip; that the conductor of the Hot Springs Railway Company, upon this statement, passed him to Malvern, but the St. Louis, Iron Mountain and Southern Railway Company, ejected him

after leaving Malvern for St. Louis, and suit was brought against this latter company. Upon this point this court held, that "The conductor of the defendant's train, upon "the plaintiff's presenting a ticket bearing no stamp of "the agent at Hot Springs, *had no authority to waive any "condition of the contract*, to dispense with the want of "such stamp, to inquire into the previous circumstances "or to permit him to travel on the train. It would be "inconsistent alike with the express terms of the con- "tract of the parties, and with the proper performance of "the duties of the conductor, in examining the tickets of "other passengers, and in conducting his train with due "regard to speed and safety, that he should undertake "to determine from oral statements of the passenger, "or other evidence, facts alleged to have taken place "before the beginning of the return trip, and as to which "the contract on the face of the ticket made the stamp of "the agent of Hot Springs Railroad Company, at Hot "Springs, the only and conclusive proof."

Thus the court held that a ticket-contract, duplicate of the one in question, is an entire contract, and therefore the doctrine of estoppel is not applicable, because the act of the agent of one company, upon which such estoppel is predicated, cannot be extended to the other companies to the contract. How, then, could this ticket be made good by estoppel, against the other two lines?

If it is defective as to one of the lines it is equally defective as to all.

As stated by this court in *Mosher* v. *St. L., I. M. & S. Ry. Co., supra*, the agreement on the part of plaintiff to re-execute his contract with the agent of defendant at Hot Springs, as therein provided, was a *condition precedent*,

without the performance of which on the part of plaintiff, he was not entitled to be carried thereon.

In *Petrie* v. *Penn. Railroad Company*, 42 N. J. Law, 450, the plaintiff had a ticket issued by the company, which, upon its face, did not authorize him to stop over at intermediate points, but to a continuous journey. However, he did so stop, and on the subsequent day entered the car on another train, and was told by the train agent the ticket in question did not give him the right to continue his journey, and that he must pay his fair. The plaintiff then informed the train agent that the conductor of the train which he had left, informed him that he could have the privilege of laying over on this ticket, and, in attestation of this statement, the other conductor had put his initials on the ticket. (Evidence equal or superior to check for baggage). "It will be perceived, therefore," says the court, "that the claim made by the plaintiff at the time of the "transaction in question was, that although his ticket did "not give him the privilege which he had exercised, still he "had acquired such privilege from one of the conductors "of defendant. * * * The evidence showed, conclu-"sively, that the claim thus presented by the plaintiff was "not well founded. It appeared that the conductor of the "train had nothing to do with the tickets, nor any author-"ity to modify their signification. That was a function "vested exclusively in the train agents. There was "neither uncertainty nor contradiction with respect to the "testimony on this point. The plaintiff set up, as his title "to the right claimed by him, an authority from the con-"ductor. That officer had no authority in the premises, "and the consequence was that, according to his own "showing, at the time of the alleged trespass he was as-"serting a claim that had no foundation in law. He was,

"consequently, rightfully expelled from the cars," etc. This was an action of trespass.

When plaintiff first presented the ticket to the conductor it appeared upon its face that the holder was not entitled to passage thereon. The ticket contract in the condition then presented was not in force. According to its own terms it was void. There was only one way to have made it effective, and that way could not be changed by either the baggage master or gate keeper, according to the terms appearing on the face of the ticket, and in every respect this ticket was so fatally defective, that plaintiff attempted to cure the defect by stating to the defendant's conductor what had been done by the baggage-master and gate-keeper, which, he insisted, authorized him to ride thereon. The conductor refused to carry plaintiff on this statement. Plaintiff had the right to elect which of the two courses he would pursue, (1), pay his fare, lose no time, and be at no further expense, damage or delay thanthe small amount of fare which he could thereafter recover back if he was right, or (2), refuse to pay his fare and leave the train.

The single question again arises, was the conductor justified in ejecting plaintiff upon the ticket-contract as presented? The conductor was either justified in expelling plaintiff, or else he was not only bound to accept the word of the plaintiff as to the acts and conduct of the baggage master and gate keeper, but was also equally bound to give all assumed legal effect to such acts and conduct on their part, and to determine as a matter of law that such acts and conduct on the part of the baggage-master and gate-keeper constituted *in* law an estoppel.

In *Mosher* v. *St. L. I. M. & Ry. Co., supra*, this court held, as heretofore cited: "It would be inconsistent

"alike with the express terms of the contract of the "parties, and with the proper performance of the duties of "the conductor, in examining the tickets of other passeng- "ers, and in conducting his train with due regard to speed "and safety, that he should undertake to determine from "oral statements of the passenger or other evidence, facts "alleged to have taken place before the beginning of the "return trip, and as to which the contract on the face of "the ticket made the stamp of the agent of the Hot "Springs Railroad Company at Hot Springs, the only "and conclusive proof."

Bradshaw v. *S. B. R. R.*, 135 Mass., 407.

Under the law announced by this court in the Mosher case, it would seem needless to further consider the argument of counsel for plaintiff. We quote, however, from the opinion of Justice Cooley in *Hubbard* v. *Ry. Co.*, 18 N. W. Rep., 580, because this learned jurist is a judicial expert touching the operations of railroads and the laws controlling the same, and has had large experience in examining into the details of railroad management and the reasonableness of rules, regulations and rates. In this case Justice COOLEY said: "In *Frederick* v. *Ry.* "*Co.*, 37 Mich., 342, it was decided as between the "conductor and passenger, the ticket must be the con- "clusive evidence of the extent of the passenger's right "to travel. No other rule can protect the conductor in "the performance of his duties or enable him to determine "what he may or may not lawfully do in managing the "train and collecting the fares."

In *Bradshaw* v. *South Boston Ry. Co.*, 135 Mass., 409, the court fully reviews this question in its opinion, and concludes: "It follows that the plaintiff was where he

"had no right to be, *after* his refusal to pay a fare, and "that he might properly be ejected from the car."

Counsel cites the case of *Butler* v. *Manchester, etc.*, 21 Law R., Q. B. Div., 209, in support of his assertion that even if plaintiff was not entitled to be carried upon his ticket, defendant was not authorized to eject him from its train because, having been admitted to the car by the gate-keeper, he was there rightfully and could not thereafter become a trespasser. If this position is well taken, it follows conclusively that one who enters rightfully upon the premises of another can never cease to rightfully hold possession; that when his right to hold ceases, he does not and cannot become a trespasser. We concede that parties without tickets desiring passage with a common carrier may enter the car without being trespassers, but they become trespassers if they fail or refuse to present a proper ticket authorizing their carriage, or pay their fare therefor. The conductor is the sole judge in transit to determine the right of the passenger to carriage upon whatever voucher or ticket he may present.

This court in the Mosher case, *supra*, and Judge Cooley, in the decision above cited, clearly hold that the conductor was justified, and that it was his duty to refuse to consider any statements, and that the ticket presented by the passenger is the only evidence of the passenger's right to ride, and if upon the face of the ticket he is not entitled to ride thereon, then the conductor is justified in refusing to carry the passenger thereon. In the case at bar, *such justification in law, followed by a complete performance of the contract as we have shown when the same had been re-executed by the plaintiff, constitutes a complete defense in this case.* IF THE CONDUCTOR WAS JUSTIFIED IN EJECTING THE PLAINTIFF, THE COMPANY CANNOT BE LIABLE THEREFOR.

The liability, *if any*, must rest on some other act, of some other officer or agent of the company, and the suit must proceed for the injury arising from that act, and not from the act of ejecting plaintiff or refusing to accept the unsigned contract as a ticket. If the baggageman wrongfully checked and forwarded the baggage of the plaintiff upon a ticket which did not authorize plaintiff to a passage upon the same train with it, and plaintiff without fault on his part, was damaged, this is not the form of action to recover.

Counsel asserts (brief, 26): "In Boylan's case the bag-"gage-master and gateman were clearly guilty of neg-"ligence in accepting the ticket without the return "stamp, and for that negligence the company and not "the passenger could be held responsible."

Counsel ignores plaintiff's contract in which he agreed (see condition 11 of contract, Rec., 31) with the defendant, that he would not hold it "liable for damages on "account of any statement not in accordance with this "contract made by any employe of said lines."

He further expressly agreed with the company, and acknowledged in condition 12, that he so understood the contract, namely, "*that no agent or employe of any of* "*the lines named in this ticket has any power to alter*, "*modify, waive, etc.*" Upon these conditions what statements or acts of the baggageman and gateman would constitute "negligence" towards plaintiff, in so far as such acts or statements related to this contract or to the rights of plaintiff thereunder? The gist of plaintiff's action is for a personal injury received at the hands of the conductor while expelling him from the train. It is not averred in the declaration that this personal injury

was the direct and immediate result of this "negligence" of the baggageman and gate-keeper.

This is not a suit for this "negligence," but it is a suit for an act of the conductor, charged in the declaration to have been unjustifiable. The negligence of these two employes is not on trial, nor is it involved in the issues tendered by the declaration. *Plaintiff avers that these acts of these two employes created an estoppel; his counsel, in argument, contend that they constitute negligence.* THE TWO POSITIONS ARE INCONSISTENT.

The question before the court is whether defendant's conductor was justified in expelling plaintiff from the train, under the circumstances and in the manner averred in plaintiff's declaration, under the ticket-tourist's contract here considered. In the Mosher case, the plaintiff appeared before the Hot Springs agent, at his office at Hot Springs, within reasonable time before the departure of the train, for the purpose of re-executing his contract, but the agent was absent and so continued until time for the departure of the train, so that the non-performance of the condition precedent, namely, the re-execution, signing, stamping, etc., was the fault of the Hot Springs agent, and might well be deemed gross negligence on his part. For this reason, defendant's conductor passed Mosher from Hot Springs to Malvern, and the conductor of the St. Louis and Iron Mountain Railway Company refused to carry him and expelled him. While this court, in its opinion, condemned the Hot Springs agent for his absence from his post of duty, it justified the conductor, notwithstanding the non-performance of the condition precedent had been waived by the conductor of the Hot Springs company by carrying Mosher from Hot Springs to Malvern, and held that Mosher's

ticket was void, and did not entitle him to any rights thereunder. *The declaration is not framed, and this suit is not brought, to recover against defendant for any wrongful or negligent act of the baggage-master and gate-keeper, and if plaintiff has any remedy against the company on this ground, it cannot be enforced in this action, under the declaration before the court.*

The conditions and limitations in the contract now before the court, would not in any sense be considered extraordinary or unreasonable by a lawyer of any considerable experience, practice or observation, if a railroad company was not one of the parties thereto. If this contract was between two natural persons, it never would have been placed in litigation. A large proportion of the controversies in which railroad companies are parties, have arisen, mainly, from the fact that public sentiment has persistently *tapered* public thought to the point that railroad companies should be judicially held to an *unnatural* construction of their contracts with *natural* persons.

The foregoing principles are fully approved and applied in:

Yorkton v. *M., L. S. & W.*, 54 Wis., 234.

Shelton v. *L. S. & M. S. Ry. Co.*, 29 Ohio State, 214.

P., C. & St. L. Ry. Co. v. *Nusum*, 60 Ind., 533.

McClure v. *P., W. & B.*, 34 Md., 532.

Rawitzky v. *Ry. Co.*, 3 Southern Rep., 387.

Hufford v. *Ry. Co.*, 18 N. W. Rep., 580, opinion of COOLEY, C. J.

III.

THE CONTRACT IN QUESTION CANNOT BE ATTACKED UPON THE GROUND THAT IT IS UNREASONABLE OR CONTRARY TO PUBLIC POLICY.

The authorities cited by counsel are strictly limited to the consideration of the reasonableness or unreasonableness of by-laws of municipal corporations, regulations or by-laws of railroad companies, and not contracts. Thus on page 13 of his brief, counsel refers to 1st Dillon on Municipal Corporations, Sec. 319–325, and cases cited, and then counsel says: "Much more will a mere *rule* or "*regulation* of a common carrier be held void or un- "reasonable," etc.

This case involves a *contract* to which the plaintiff is an express party, and not an *ex parte* regulation or by-law of the company. If the parties agree to all the terms of a contract, by such agreement the reasonableness of such terms are conceded and concluded. Plaintiff avers in his declaration an estoppel, in order to avoid the effect of the non-performance of the *condition precedent* recited in this contract so executed by him. *If the contract was void because unreasonable or contrary to public policy, can estoppel be relied upon to recover for breach of such contract?*

But plaintiff further avers in his declaration, that after he was expelled from the train at Lawrence, he went back and executed the contract with the agent at Hot Springs, and had the same duly stamped by him, as the *conditions precedent* required, and thereafter entering the train of defendant, the ticket was accepted and he was carried thereon from Hot Springs to Chicago. *This*

action of plaintiff clearly estops him from asserting the unreasonableness of a condition which he thus performed, and upon such performance thereof by him, the defendant carried him to the city of Chicago, and thus fully performed its part.

In the Mosher case, (127 U. S., 393) this court held: "The right of this plaintiff to be carried upon the defend- "ant's train without paying additional fare, does not de- "pend upon his having been received as an ordinary "passenger, or upon any representations made by a ticket "seller, conductor, or other officer of the company as to "his right to use a ticket, but wholly upon the construc- "tion and effect of the written contract, signed by him, "upon the face of the ticket. * * * By which, in "consideration of a reduced rate of fare he agreed to the "following terms."

Thus this court sustains the legality of the contract. I know of no case in which any court, English or American has held that any provision of any legal contract was illegal on the ground that it was unreasonable. Counsel's assertion of estoppel and unreasonableness of the contract involves the proposition that defendant is estopped by the acts of its baggage-master and gate-keeper, because the contract avoided by such estoppel is unreasonable. None of the cases cited by counsel apply in any sense to a legal contract between two competent parties entering into and subscribing to such contract. Counsel cite the case of *Butler* v. *Manchester, etc., supra*. In this case no tourist ticket contract executed by the parties respectively was involved, and the rule discussed was an arbitrary one, which found its place only in the by-laws of the corporation. Assuming, however, that this case was directly in point, this court is not required to adopt the English law in the construction of American contracts.

Plaintiff urges that the defendant company ought to be held liable and made to respond in damages for the expulsion of plaintiff from defendant's train, not because plaintiff was entitled to ride upon his unexecuted contract, but because his baggage had been checked by the baggage-master, and he had been admitted to the train by the gate-keeper upon this unexecuted contract, and that not to hold defendant company responsible for such acts of its baggage-master and gate-keeper would be contrary to public policy.

Suppose plaintiff had applied to the baggage master to check his baggage, and the baggage-master had upon such request checked the same, without plaintiff having or presenting any ticket whatever, could plaintiff insist, that thereby the company was estopped from requiring a presentation of any ticket whatever by the plaintiff to the conductor, because, forsooth, if he was not permitted to follow his baggage notwithstanding the same had been checked without a ticket, he and his baggage would be divided, and upon the further ground, that he would be carried from the point of checking such baggage where he might have obtained a ticket. Once admit the logic and conclusion of counsel's argument, and it must be conceded, that a check for baggage is equivalent to a ticket, and that the conductor of a train is bound by any statement a passenger may make with reference to his right or assumed right to ride, if he presents his check for his baggage at the time of making such statement. The unexecuted contract presented to the conductor by plaintiff was in fact no ticket, and the plaintiff was no more entitled to ride thereon, than if he had presented a piece of blank paper. So this court held in the Mosher case, (127 U. S., 394): "By the express contract between the parties, therefore,

"*the plaintiff had no right to a return passage under the* "*ticket, unless it bore the stamp of the agent at Hot* "*Springs.*"

Defendant is a common carrier, and as such it may be compelled to serve the public, and to establish a local rate without discrimination for the carriage of passengers and freight, within the state of its organization. But the moment the common carrier announces to the public that in place of a local rate a tourist ticket contract has been substituted, and that any person may elect to pay the local rate for an outgoing passage, or at less than the local rate to obtain a round trip tourist ticket, by signing a contract such as is here presented, it eliminates all questions of public policy or unreasonableness of the conditions recited in such contract. This contract is the result of the voluntary action of the individual passenger, who thereby accepts the tourist ticket and executes the contract, and thereby agrees to and accepts the conditions therein, in consideration of the reduced rate in lieu of paying the higher local rate.

If the common carrier agrees to carry at a reduced rate and the passenger desires the benefit thereof, shall the passenger be bound by the conditions and limitations upon which such reduced rate is offered? Or shall he take this exceptional privilege without consideration therefor, viz: without binding himself by the closer and less general conditions or privileges, than the local or unreduced rate would impose. The consideration, namely the reduced rate for these limitations if legal are entitled to command the limitations thereto attached. If the conditions attached to the taking of a ticket at reduced prices are unreasonable, then the reduced price is equally unreasonable. But counsel assert (page 17.): "That no

"regulation or restriction of the common right of car-
"riage can be tolerated by the judicial authority that
"could not be applied with equal propriety to all classes
"of passengers."

What appears in the declaration, or in the proof offered and rejected by the court below, to show that this special tourist ticket-contract to which plaintiff engaged himself for the outward and return passage was limited to any special class? *No such discrimination was averred by plaintiff.* We are dealing in this case with contracts and not classes. The right exercised by plaintiff in taking this *tourist*-ticket and executing this contract controlling the same, was open to the entire public, but as each individual of the public entered into this contract with the common carrier, it became a personal contract subject to the rules applicable to all personal contracts without reference to the question of public policy applicable to common carriers, in the absence of such contract.

IV.

We have stated that two different and separate causes of action are set forth in the declaration. *First*, for a breach of contract, and *second* for personal injury. The distinction between these two causes of action in form, the marked and open difference between the pleadings, are clearly recognized in the text books and maintained by the courts. The measure of damages in each class is fixed by well known rules. The cause of action, the pleadings, the evidence and the measure of damages are so different in these two classes of cases that it is utterly impossible to unite them in a single case. It is idle to contend that in an action in assumpsit for a failure

on the part of the defendant to pay his promissory note, damages can be recovered for assault and battery committed by the plaintiff upon the defendant, while the latter was insisting upon payment. The rule is stated in Sedgwick on the Measure of Damages (5th Ed.), p. 224: "As to the pleadings it is the constant and sedulous ob- "ject of the Anglo-American law to draw a distinct line "between actions of contract and those of tort, *ex con-* "*tractu*, and *ex delicto;* and the rigor with which this "distinction is maintained in regard to joinder of counts, "causes of action, and election of actions, is familiar "learning. * * *

"*Again as to the rules of evidence, while it is perfectly* "*true that in actions of tort every attendant circumstance of* "*aggravation can be given in evidence, on the other hand* "*nothing is better settled than that in actions* of contract "the parties are limited to the mere evidence *of the breach* "*of contract*."

In tort the amount of damages recoverable depends upon the extent of the injury. For breach of contract the amount of damages depends upon the contract itself, which alone furnishes the measure of damages. So SEDGWICK states the rule at p. 221: "It has been al- "ready said that our law makes a broad distinction on "the subject of compensation between actions of con- "tract and actions of tort, and while it permits the jury "in the latter instance to take into consideration the in- "tention of the offending party, to review all the circum- "stances of the case, and to make their verdict conduce to "the purposes of punishment as well as compensation, "that on the other hand, in actions of contract, the motive "or animus of the defendant is entirely disregarded, and "the damages are strictly limited to the direct pecuni-

"ary loss resulting from the breach of the agreement in "question."

Would the general denial that the defendant did not undertake and promise extend to and include the defense that the defendant was not guilty of the assault and battery charged in the declaration?

In *Henion* v. *Mortin*, 2 Ashmead, 152, held: "The "difference between assumpsit, which is an action directly "on the contract, and case which is collateral to it is "shown by the pleadings. *The general issue in the first "being non-assumpsit, and in the second, not guilty.*"

Zeil v. *Arnold*, 2 Pa. R., 292.
Dixon v. *Barclay*, 22 Ala., 378.
Nations v. *Hawkins*, Admr. 11 Ala., 864.
Mayo v. *Madden*, 4 Cali., 27.

In *Crocker* v. *Willards*, 28 N. H., 135, held: "It is "alleged that the first count is in tort, trespass on "the case, and the second, a count in assumpsit on con- "tract. *It is well-settled that counts for tort and upon "contracts cannot be joined at common law, which is the "law here.*"

Wilson v. *Marsh*, 1 Johnson, 503.
Stoyel v. *Westcott*, 2 Day, 418.
11 Johnson, 479.
2 Wms. Saunders, 117, c. note.

In *Church* v. *Mumford*, 11 Johnson, 479, held: "It "is no doubt a well settled rule that causes of action "founded upon tort, and upon contract, cannot be joined "in the same declaration."

In suits upon express or implied contracts the consideration must be averred. In cases of fraud no implied

promise springs from the tortious act, therefore, in actions in tort no consideration can be or is averred.

The use of personal force and the personal injury resulting therefrom constitute the tort described in the declaration in the case at bar. If no promise, express or implied springs from the wrong, then an action in assumpsit will not lie thereon.

Carson River Lumbering Company v. *Bassett et al.*, 2 Nev., 253.
Jones v. *Hoar*, 5 Pick., 285.
Howland v. *Needham*, 10 Wis., 495.

In *Bennett* v. *Francis*, 2 Bosanquet & Puller, 550, Lord ALVANLEY, C. J., held: "I do not find that the judges in "any of the cases have gone so far as to hold that a tort "may, at the option of the plaintiff only, be converted into "a contract."

This question involves another point, namely, the effect of the statute of limitations.

The declaration shows from the dates therein stated, that an action for tort or for personal injury is barred by the statute of limitations in Arkansas, where the defendant company wholly resides and operates its railroad, as well as in the State of Illinois, where the suit was brought. In actions in assumpsit for breach of contract, the statute bars the remedy proceeding upon an express or implied promise. In cases of trespass, the statute bars the remedy proceeding upon a tort from which no promise arises. The remedy for the wrong being barred before the action was brought, the bar cannot be removed by uniting the trespass with an alleged breach of contract. Actions for tort are barred in Arkansas one year after the cause of action shall accrue. (Sec. 4,479, Chap. 97, stat-

ute of Arkansas entitled Limitations.) This statutory bar in Illinois limits the right of action for personal injury to two years. (Sec. 14 Statute of Illinois entitled Limitations.)

This action accrued in Arkansas, where the injury occurred, and section 20, Statute of Limitations of Illinois, provides that when an action is barred in the state where it accrues, it is equally barred here. But the bar was complete in this state, even if the action had accrued in this state.

Plaintiff was ejected from the train April 19, 1882, and brought this suit April 9, 1887.

We have shown that assault and battery—injury to the person, cannot be considered as a ground for recovery in a breach of contract. But assuming that an action of trespass may be joined with an action of breach of contract, the declaration upon its face in the light of the authorities here presented, is not sufficient and would not support a verdict against the defendant.

In *Churchill* v. *C. & A. R. R. Co.*, 67 Ill., 394, held: "It "is claimed that it is averred in the declaration that excessive force was used in ejecting plaintiff in error from the "train. We find no such averment. The averment is, that "the servants of the company 'did forcibly and with great "violence, thrust and eject plaintiff from the said cars.' "This does not imply that excessive force was used; "there is nothing to show how much force was necessary. "It may be that no more force was used than was absolutely necessary. Plaintiff in error may have resisted "with such violence as to require all the force that was "used, and as the company had the right to use all the "force necessary for his expulsion, on his refusing to pay "his fare or leave the train, on being requested, and he

"fails to aver that he did not resist, and that the force "employed was wanton, we cannot presume excessive "force was employed by the company."

The declaration discloses the fact that after the defendant refused to carry the plaintiff, and after the plaintiff was ejected, he went back and signed the contract, as he was required to do in the first instance, and then presented the ticket and was carried by defendant according to its terms. If recovery may be had for special damages arising between the time when the plaintiff might demand the performance and the time performed by the defendant, it is clear, upon principle and precedent, that no recovery could be had for a personal injury received by the plaintiff from the defendant at or between the time of refusing to perform, and time of final performance, in an action of assumpsit for breach of such performed contract.

Defendant interposed to this declaration its general and special demurrer which, upon consideration of the court below, was overruled, and thereupon defendant filed two different and distinct sets of pleas, the first applicable to the declaration for breach of contract, and the second applicable to the declaration in trespass for personal injury. Counsel for plaintiff demurred to the first and moved to strike the second, which demurrer and motion were sustained by the court below BEFORE *the announcement of the decision of this court* in *Mosher* v. *St., L. I. M. & S. Ry. Co., supra.*

After the announcement of this decision the cause came on for hearing and the court below, in its application of the rule stated in Mosher, *supra*, sustained the motion of counsel for defendant to exclude all the testimony offered by plaintiff. Even if the declaration had

been sufficient to support a judgment, the evidence offered would have been wholly insufficient to sustain a verdict, but each ruling of the court below, the verdict for defendant and the judgment of the court thereon are fully authorized and sustained by the decision of this court in the Mosher case, *supra*, upon which we confidently rely for judgment of affirmance upon the record here presented.

Respectfully submitted.

G. W. KRETZINGER,
For Defendant in Error.